IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE EQUITABLE TRUST COMPANY OF NEW YORK,
Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY,
Defendant.

BRIEF ON APPEAL

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I.

No Suit in Equity or Formal Proceeding is Necessary to Found a Basis for Injunction to Prohibit a Party from Further Prosecuting an Action Which Amounts to an Interference with Matters in the Custody of the Court.

In *Ex Parte Tyler,* 149 U. S. 164, the Supreme Court said:

> "The property in question was in the custody of the circuit court, in a cause within its jurisdiction, and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and in order to sustain the receiver's application the

ordinary grounds of equity interposition were not required to be set forth."

In that case, as in this, the general order appointing the receivers contained a clause enjoining all persons from interfering with them. In that case, as in this, the matter was brought to the attention of the Court in an informal manner.

The Supreme Court say:

"Ordinarily the court will not allow its receiver to be sued touching the property in his charge, nor for any malfeasance of the parties, or others, without its consent; and while the third section of the Act of Congress of March 3, 1887 (24 Stat. at L. 552, chap. 373) now permits a receiver to be sued without leave, it also provides that 'such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice'. Neither that nor the second section, which provides that the receiver shall manage the property 'according to the valid laws of the state in which such property shall be situated', restricts the power of the circuit courts to preserve property in the custody of the law from external attack.

"In this case, instead of issuing an attachment against the petitioner at once for forcibly seizing the rolling stock of this railroad under the circumstances appearing upon the face of the rec-

ord, the court adopted the course of serving him with a rule to show cause, and with an order restraining him, in the meantime, from interference with the property. The petitioner refused to release the property upon request of the receiver, and persisted in his attempt to hold possession thereof by force in disregard of the order of the court."

The general rule is laid down in *Beach on Receivers,* as follows:

"And a receiver is entitled to an injunction to restrain unauthorized interference with the property in his possession even as against strangers who are not parties to the receivership proceeding, and in such case the court may properly allow him to proceed by petition in the receivership suit and need not require him to resort to an independent action in equity."

And again, Section 747, the learned author says:

"Injunctions to protect receiver's possession.

"The aid of an injunction is sometimes a necessary adjunct to a receivership for the purpose of protecting the receiver's possession, and to prevent any unauthorized interference, by suit or otherwise, with the property or fund intrusted to his care. Indeed, so jealous are courts of equity of any unauthorized interference with the possession of their receivers, that they usually require all adverse claimants to come in and

assert their rights in the action in which the receiver was appointed. And when parties asserting a right to property which is subject to a receivership attempt any unauthorized interference therewith, or institute actions for its recovery against the receiver, without first obtaining leave of the court by which he was appointed, that court may enjoin them from proceeding, and thus compel them to assert their rights in the same forum in which the receiver was appointed."

In *Krippendorf* v. *Hyde,* 110 U. S. 276, it is said:

"The equitable powers of courts of law over their own process to prevent abuse, oppression and injustice are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law."

II.

We have attached hereto our brief filed in the lower court:

IN THE

DISTRICT COURT

FOR THE

UNITED STATES

NORTHERN DISTRICT OF CALIFORNIA,
SECOND DIVISION.

THE EQUITABLE TRUST COMPANY OF NEW YORK, *Plaintiff,* vs. WESTERN PACIFIC RAILWAY COMPANY, *Defendant.*	IN EQUITY. No. 169.

MEMORANDUM OF POINTS AND AUTHORITIES ON ORDER TO SHOW CAUSE

This matter is before the Court upon an order, addressed to the plaintiff, directing it to show cause why it should not be restrained from further prosecuting a certain "dependent action" in the Southern District of New York.

On the 2nd day of March, 1915, the said plaintiff filed its bill, in ordinary form, for the foreclosure

of a mortgage given by the Western Pacific Railway Company. This bill alleged the complete insolvency of the Railway, and its default upon the interest on its bonds, amounting to $1,0,250,000, and prayed for a foreclosure, and sale of all the property of the defendant. A copy of the mortgage was attached as an exhibit to the bill.

On the same day, the defendant filed its answer, admitting all the allegations of the bill, and joining in the prayer for a receiver.

Upon these pleadings, the Court made and entered its order appointing Frank G. Drum and Warren Olney, Jr., receivers of *all* the property of the defendant, including all contracts and choses in action, accounts, etc.

In accordance with this order, the receivers took possession of the railroad, and have since conducted its business.

Subsequently, the plaintiff, with leave of Court, filed an amended bill of complaint, substantially the same as the original bill, except that the prayer was for a sale of all the property of the Railway, excepting certain features of a certain "Contract B". A copy of the Mortgage was also attached to this amended bill. The defendant filed a similar answer to this amended bill, and the Court thereupon made the same order for the appointment of the receivers.

This amended bill of complaint contains an allegation that under the terms of the mortgage, there was conveyed to plaintiff's predecessor, Bowling

Green Trust Company, certain detailed property of the defendant. Among the things so alleged to be conveyed was:

> "An agreement with the Denver and Rio Grande Railroad Company, the Rio Grande Western Railway Company and the Trustee hereunder, whereby said three railroad companies agree, among other things, to maintain a joint transportation system, and whereby the Denver and Rio Grande Railroad Company and the Rio Grande Western Railway Company also jointly and severally agree, so long as any of the bonds secured hereby shall remain unpaid, principal or interest, to purchase unsecured obligations of the Railway Company to such amounts as will yield moneys sufficient, *after application of the proper, available income of the Railway Company* and other moneys appropriated by it for the purpose, to provide for the payment of the Railway Company's operating and maintenance expenses, taxes, the interest upon the bonds secured hereby, the annual payment to be made into the sinking fund provided for hereby, any other expense that may be necessary to assure the continued operation of the Railway Company's property and the unimpaired lien and priority of this indenture, any taxes that the Railway Company may be required by law or permitted to pay upon or deduct from the principal or interest of the bonds secured thereby and all interest

upon indebtedness of the Railway Company other than said bonds, and to pay the purchase price of said obligations, so far as such payments shall be necessary to provide for the payment of the interest upon the bonds secured hereby and the payments to be made into the sinking fund for the redemption of said bonds to the Trustee, at such times and in such manner as to make the same available for the payments to be made therewith as aforesaid."

This is the agreement known as "Contract B".

This amended bill of complaint also alleges that that on July 1, 1908, the defendant executed a second mortgage upon its property to the Central Trust Company of New York. It is likewise alleged:

"Twelfth: That by reason of said default in the payment of interest the security created by the said First Mortgage has become enforceable, and this suit is brought for the foreclosure of the said Mortgage, the sale of the trust estate, *and the enforcement of the security created by the said First Mortgage,* and the protection of the rights and interests of the holders of the First Mortgage Five Per Cent Thirty Year Gold Bonds."

It is worth while to note, at this point, that the amended bill, by its averments, is brought for "the sale of the trust estate, *and* the enforcement of the security created by the First Mortgage," and that a part of the security of the First Mortgage is "Contract B".

On the 19th of May, 1915, the receivers filed in this Court a report, setting up all the contracts and agreement with the Denver and Rio Grande and the Missouri Pacific. In that report, they stated that the relations were so complicated, the accounts were so involved, and so many and difficult questions of law, fact, and policy were involved, that they did not feel prepared to ask the Court for definite instructions; accordingly, they requested six months time to investigate, and make recommendations for instructions. This report set out "Contract B" in full. Upon the filing of this report, the Court made an order, directing that it be heard on the 14th of June, and further directing that it be served on the parties to this action, and all corporations who were parties to any of the contracts, not later than the 19th day of May. This was accordingly done.

On the 26th day of May, the plaintiff filed, in the District Court for the Southern District of New York, its bill for foreclosure, in the same words as the amended bill in this Court, and an order was made there appointing Mr. Drum and Mr. Olney ancillary receivers. This was without the knowledge of the receivers.

On May 27th the plaintiff filed a bill in New York, which is entitled as of the ancillary bill, and also has the sub-title of "Ancillary Dependent Action in Equity," against the Denver and Rio Grande, the Western Pacific, and two fictitious defendants. This dependent bill was filed without leave of this Court, or the New York Court.

This dependent bill alleges the execution and delivery to its predecessor of the said First Mortgage, and a copy of that document is attached to it as an exhibit. The dependent bill also alleges that "Contract B" was conveyed by the Western Pacific, as part of the security of the First Mortgage. It likewise alleges that by "Contract B", a through line of railroad was established to the Pacific Coast. The dependent bill then contains the following:

> "That in consideration of the matters aforesaid, and in order to procure the completion of the railroad of the Western Pacific Company, and the resultant opening and operation of the said joint through line necessary to secure to the promising companies (being the parties of the first part to said contract) an outlet to the Pacific Coast, and also to enable the Western Pacific Company to sell its said First Mortgage Bonds at a higher price and upon more advantageous terms than it could sell the same if said agreement were not so made and pledged under the said First Mortgage, the Old Denver Company and the Rio Grande Western Company, jointly and severally, covenanted and agreed with the Western Pacific Company and with the Trustee under the Western Pacific Company's First Mortgage as aforesaid, to pay semi-annually to the Trustee of said mortgage, beginning February 26, 1909, and continuing until all of the bonds secured by the Western Pacific Company's First Mortgage should be

fully paid, principal and interest, such sum of money as should be necessary *in addition to the earnings of the Western Pacific Company* and other moneys actually and lawfully appropriated by it for the purpose, to meet the interest and sinking fund payments upon the issue of bonds secured by the said First Mortgage, and provided for therein, promptly and at the time and place stipulated in the said mortgage, and to pay any taxes which the Western Pacific Company might be required or permitted to pay thereon or to deduct therefrom."

There are also allegations that, under the terms of "Contract B", the obligations of the parties run with the respective railroads.

The dependent bill also alleges as follows:

"That by and according to the terms of the said Contract B, the companies there promising, now the defendant the New Denver Company, became bound to pay unto the Trustee under the Western Pacific Company's First Mortgage, from and after September 1, 1908, or the earlier acquisition or completion of the Western Pacific Company's main line of railroad from San Francisco to Salt Lake City, such amount as would, together with the amount actually and lawfully appropriated by the Western Pacific Company *out of its earnings and other income,* and by it paid over to its fiscal agent in the City of New York or its fiscal agent in the City of San Francisco, or both of them, for the

purpose of paying the interest to fall due during the then current calendar half year upon the Western Pacific Company's First Mortgage bonds upon which interest should be payable, be sufficient to pay all such semi-annual installment of such interest; and such further amount, as would, together with the amount actually and lawfully appropriated by the Western Pacific Company out of its earnings and other income, and by it paid over to the mortgage trustee for the purpose of meeting the sinking fund payment, if any, required by said mortgage to be made by the Western Pacific Company during the then current calendar half year, be sufficient to meet such sinking fund payment.

"That as your orator is informed and believes and therefore avers, the Western Pacific Company has at various times and during various periods since March 1, 1908, *made and received earnings and other income which might properly have been lawfully appropriated and paid by it to the mortgage trustee on account of one or both of the said classes of payments,* to wit, sinking fund payments and interest payments, as aforesaid, but the amount thereof is unknown to your orator, save as your orator is informed and believes and therefore avers that the same was insufficient upon the maturity of each semi-annual payment due to the sinking fund as aforesaid, and upon the maturity of

each semi-annual installment of interest as aforesaid, to pay or meet the whole thereof; and that under the provisions of the said Contract B, a liability and obligation arose on the part of the defendant the New Denver Company upon the occasion of the maturity of each such semi-annual installment of interest and upon the occasion of the maturity of each such semi-annual payment due to the sinking fund, to pay to the said mortgage trustee a sum which, together with any mortcome theretofore actually paid by the Western Pacific Company to the mortgage trustee for that purpose, should make up the whole sum then due for a sinking fund payment or interest payment as aforesaid, but the exact amount of such deficiency or such liability is to your orator unknown."

The dependent bill then sets out the proceedings in this Court, as a Court of primary jurisdiction, and in New York as a Court of ancillary jurisdiction. It then alleges that it is the intention of plaintiff to shortly declare the principal due, and obtain a decree of foreclosure and sale, and avers that the amount realized will probably be less than the face of the bonds.

The dependent bill then avers:

"That by reason of the uncertainty as hereinbefore set forth as to the amount of earnings of the Western Pacific Company from time to time heretobefore or hereafter applicable to said sinking fund payments or hereafter to said

interest installments, your orator is not informed as to the exact amount for which the defendant the New Denver Company is liable under the terms of said Contract B, in respect either of payments due from time to time to the said sinking fund or for said installments of interest or by reason of the breach of said contract as a whole; that the true amount thus due and the true amount of such liability can appear only upon an accounting to be had under the direction of this Honorable Court ascertaining the amount of such earnings so applicable and the amount of deficiency therein for which the defendant the New Denver Company is liable as aforesaid; and that also, in view and because of the various defaults of the New Denver Company, hereinbefore set forth, that Company is liable to your orator for a total or gross sum in liquidation of its total future liability under said Contract B and also under the said guaranties, but such total or gross sum can only be ascertained and fixed by an accounting and adjudication by this Honorable Court proceeding in due course upon equitable principles. That your orator is informed and believes that *adverse claims in respect of the amount earned and the amount due are made by the defendant the Western Pacific Company* and the defendant the New Denver Company, which can be resolved and determined only on such an accounting as aforesaid, to which *both of the said companies shall be parties,* and that the defend-

ant the New Denver Company is liable herein for the amount of the deficiency appearing upon such an acounting in respect of the said sinking fund payments, of the said interest payments, and the amount fixed in respect to the future liability of said defendant."

The prayer is:

1. To determine the meaning of "Contract B" as to sinking fund;

2. For an accounting against the Western Pacific;

3. For a determination of the amount which will remain due after the foreclosure sale;

4. For a determination of the meaning of "Contract B" as to that instrument constituting a lien;

5. For a receiver of the Denver and Rio Grande, and the application of its property to the lien of "Contract B".

6. For an injunction against the fictitious defendants.

When the receivers learned of the filing of this dependent action, they presented to this Court a petition for instructions as to whether or not *they* should begin a suit on "Contract B". At the hearing, Mr. How, representing the plaintiff, and Mr. Bowie, of Counsel for the "Bondholders' Committee", appeared. After hearing, this Court directed the issuance of a rule to show cause why the plain-

tiff should not be restrained from proceeding further with the dependent action in New York.

At the hearing, the plaintiff presented its answer, in which it challenged the jurisdiction of this Court to issue an injunction; alleges that it is the only person capable of enforcing "Contract B"; sets up that an injunction would be a violation of the "due process amendment to the Constitution"; alleges that the receivers "or one of them", seek to litigate in this Court questions properly cognizable in New York; that the Denver and Rio Grande is not subject to the jurisdiction of this Court; that the plaintiff, in so far as "Contract B" is concerned, is not subject to the jurisdiction of this Court; that the dependent bill does not seek to litigate anything cognizable in this Court; that nothing contained in the petition of the receivers for instructions, filed May 18th, sought for instructions in regard to "Contract B"; that nothing contained in the dependent bill can affect the relations between the Western Pacific and the Denver and Rio Grande.

The plaintiff also presented the affidavit of Alvin W. Krech, President of The Equitable Trust Company of New York. That affidavit states that "Contract B" was specifically and separately mentioned in and is subject to the terms and provisions of the First Mortgage; sets out quite fully the provisions of the First Mortgage and of "Contract B", or rather the conclusions of affiant as to the provisions of those instruments; it states that "Contract B" was not submitted to this Court in the bill to fore-

close. Affiant states that of the outstanding bonds, the sum of $36,812,000 bears stamped upon them the independent guarantee of the Denver and Rio Grande, and that there are approximately $13,188,000 which do not bear the stamp guarantee. Affiant sets out that all of the bonds were sold in the year 1905 to a syndicate, and that in May, 1908, an agreement was entered into between the Denver and Rio Grande and this syndicate for the consolidation of the Denver and Rio Grande and the Rio Grande Western into a new corporation, and the issuance by the new corporation of First and Refunding Mortgage Bonds upon practically all of the property and assets of the Denver and Rio Grande. This syndicate agreed to purchase $10,000,000 face value of the Denver Company's convertible notes, which were secured by a deposit of $22,500,000 principal amount of the First and Refunding Mortgage Bonds. That the immediate purpose of this agreement was to raise money to be employed by the Denver Company in completing the work of constructing the main line of the Western Pacific. That these funds up to the sum of $18,750,000, were to be turned over by the Western Pacific in payment for $25,000,000 face value of the Western Pacific Second Mortgage Bonds.

That as a part of the consideration of this arrangement with the Syndicate, the Denver and Rio Grande agreed to stamp on the Western Pacific First Mortgage Bonds an unconditional guarantee for the punc-

tual payment of the interest; that the Syndicate purchased said convertible notes, which were subsequently paid. Large amounts of the First and Refunding Bonds of the Denver and Rio Grande were sold and the proceeds turned over to the Western Pacific.

That certain bondholders of the Western Pacific formed a Bondholders' Committee, and that there has been deposited with this Committee bonds of the Western Pacific of the par value of $26,055,700. That additional bonds of approximately $700,000 have been promised for deposit by bondholders.

That the dependent suit in New York was started before the plaintiff or its New York counsel had any knowledge whatsoever of the petition of the receivers of May 18th.

That three suits have been brought by individuals upon the stamp guaranties in the Courts of New York, one for $1250, one for $250 and one for $225. Copies of the New York proceedings and the contract between the bondholders and the Bondholders' Committee are attached to this affidavit.

The plaintiff also presents the affidavit of F. W. M. Cutcheon, one of the attorneys for the Bondholders' Protective Committee. The names of the Committee are set out in the affidavit. This Protective Committee was organized informally some days prior to May 1st, 1915.

That this Committee has entered into a certain agreement which is attached to the affidavit. That

shortly after May 1, 1915, a circular letter was issued to the bondholders inviting them to deposit their bonds with the Committee.

That there is another committee organized in Holland of bondholders in that country, and that that committee is to co-operate with the American committee. That the members of the Committee, or their families, or firms with which they are connected, represent $8,600,000 of the First Mortgage Bonds.

That the Bondholders' Committee adopted a resolution requesting the plaintiff to bring suit against the Denver and Rio Grande Railroad Company, providing that nothing should be included in or omitted from the suit which would affect the right of the Western Pacific First Mortgage Bondholders to assert a legal or equitable lien upon the assets of the Denver and Rio Grande.

That the purpose of the Committee in approving the said bill was, first, to preserve the rights of the bondholders of those bonds which are unstamped; second, that it was the wish of the bondholders; third, that the Denver and Rio Grande should not be forced into the hands of receivers by judgments obtained by individual bondholders; and fourth, that as a result of possible negotiations between the Denver and Rio Grande and the Committee, its surplus earnings might be applied to the payment of the interest.

That the Denver and Rio Grande has always made net earnings in excess of the amount necessary to pay

the interest on its own bonded debt. That the Denver and Rio Grande will be enabled, with the earnings of the Western Pacific, to pay the interest on the Western Pacific Bonds.

That the Denver and Rio Grande has large Treasury bonds which can be sold and the amount applied to the payment of the interest of the Western Pacific Bonds.

That the Denver and Rio Grande has upon deposit, under its Adjustment Mortgage, as security for $10,000,000 Adjustment Bonds, the sum of $7,000,000 First and Refunding Mortgage Bonds. That the First and Refunding Mortgage Bonds have a market value of $470 per bond. That default has occurred under the Adjustment Mortgage above referred to, and that if judgments are obtained on the guaranty of the Western Pacific Bonds, that the Adjustment bondholders of the Denver and Rio Grande will take steps to throw it into the hands of receivers.

That the obligations of the Denver and Rio Grande, in addition to its obligation on the Western Pacific Bonds, amount to secured obligations in the sum of $124,000,000. That of this $124,000,000, $42,000,000 is for obligations created since the obligation to pay the interest on the First Mortgage Bonds of the Western Pacific. That if it should be necessary to re-organize the Denver and Rio Grande, it would be necessary to raise the sum of about $25,000,000 for betterments.

This affidavit concludes with a resolution of the Bondholders' Protective Committee calling upon this Court not to enjoin the plaintiff from prosecuting the dependent action.

The petition of the Receivers of the 19th of May, and the affidavit of Counsel for Receivers, both used on this hearing, show the following documents:

1. An agreement of the Denver and Rio Grande and the Rio Grande Western with the Western Pacific, by which the former companies agree to execute contracts A, B and C, in such form that they can be pledged under the First Mortgage.

2. Contract "A", which provides that the Denver and Rio Grande shall purchase $25,000,000 of second mortgage bonds at 75%.

3. Contract "B".

4. Contract "C", providing for traffic arrangements with the Missouri Pacific.

NOTE: Contracts "A", "B" and "C" were pledged under the First Mortgage.

5. The First Mortgage, or Deed of Trust.

6. The Second Mortgage, or Deed of Trust.

7. The lease from the Denver and Rio Grande to the Western Pacific of freight terminals in Salt Lake City.

8. The lease from the Denver and Rio Grande to the Western Pacific of passenger equipment.

9. The modification of the passenger equipment lease.

10. An agreement between the Denver and Rio Grande, the Western Pacific, the Salt Lake Union Depot and Railroad Company, and the Bankers' Trust Company for the joint use of the Union Passenger Depot in Salt Lake.

11. The first Mortgage, or Deed of Trust of the Salt Lake Union Depot and Railroad Company.

NOTE. The agreement for joint use of the union depot by the two railroads is pledged under this mortgage, to secure the bonds of the Union Depot Company.

12. An amendment to this latter deed of trust, to which the bondholders were parties.

13. An agreement between the Denver and Rio Grande and the Western Pacific, by which the Union Depot Company was to acquire certain lands.

14. An agreement with the Denver and Rio Grande for the division of the stock of the Salt Lake Depot Company.

15. An agreement with the Denver and Rio Grande, providing the manner in which advancements shall be charged on the books of the Western Pacific, and providing that the Western Pacific shall never be called upon for reimbursements until its earnings shall justify such payment.

16. An agreement between the Denver and Rio Grande, the Western Pacific, and Bowling Green

Trust Company, for the deposit of certain Western Pacific Second Mortgage Bonds, as security for moneys to be advanced in *pro tanto* fulfillment of Contracts "A" and "B".

17. An agreement of the Denver and Rio Grande, the Western Pacific, and the Equitable Trust Company, by which certain of the second mortgage bonds are to be taken, and pledged under the Denver's Refunding Mortgage, and the proceeds expended in *pro tanto* fulfillment of Contracts "A" and "B".

18. An agreement between the Western Pacific and the Utah Fuel Company for the advancement of one semi-annual interest payment on the First Mortgage Bonds.

19. An agreement between the Denver and Rio Grande and the Utah Fuel Company, whereby the Denver and Rio Grande agrees to cause the capital stock of the Western Pacific to be increased after July 1, 1915, to an amount sufficient to cover the indebtedness created by the last mentioned contract.

20. The 7% Adjustment Mortgage of the Denver and Rio Grande.

I.

The receivers represent all the parties interested in the property—plaintiff, defendant, stockholders, bondholders, and unsecured creditors — and the rights of action which any of them had are vested in the receivers.

In *McLeod* vs. *City of New Albany,* 66 Fed. 378, the Court of Appeals of the Seventh Circuit says:

> "The other parties, whose presence is suggested as essential, are parties to the original bill, as holding incumbrances upon the property subordinate to the lien of the complainant. They were in court in the suit in which the receivers were appointed, and were bound to take notice of the intervening petition of the city filed in that suit, and of the proceedings thereunder. It was not necessary that they should be made formal parties to the petition. Being parties to the suit, they were in fact parties to the intervening petition. The receivers, in respect to the conservation of the property, represent all parties to the original bill. It was their duty to preserve the estate, and thereto to pay taxes thereon. If the taxes were illegally laid, it was their duty, representing all in interest, to contest payment. If parties to the original bill desired to take active part in the contest, they had the right to be heard, and such right, if demanded, would doubtless have been accorded to them. They did not so ask, although, being parties to the suit, they were obligated to take notice of the proceedings. They are not here objecting that they were not well represented by the receivers. The latter cannot for the first time, after full hearing upon the merits before the master, ob-

ject that those they represented should be formally notified of the petition."

The following language, from *Henning* vs. *Raymond,* 35 Minn. 303, 29 N. W. 132, is fully borne out by the principles of modern practice:

"The receiver is appointed for the benefit of all concerned. He is the representative of the court, and of all parties interested in the litigation wherein he is appointed. He is the right arm of the court in exercising the jurisdiction invoked in such cases of administering the property. The court can only administer and dispose of it through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver, and the proceeds received and controlled by him alone. If the suit be nominally prosecuted in the name of the original owners of the property, it is an inconvenient, as well as useless, form; for they have no discretion as to instituting the suit, and no control over its management, and no right to the possession of the proceeds. The receiver, as an officer of the court which has taken control of the property, is, for the time being, and for the purpose of the administration of the assets, the real party in interest in the litigation. There is no reason therefore, why the suit should not be instituted in his own name. Hence, in many states, it is so provided by statute. But in many jurisdictions, in the absence of any such statute, it

has been held that the courts may, by virtue of their inherent equity powers, authorize their receivers to institute suits in their own names.

Davis vs. *Gray,* 16 Wall. 203;
Harwick vs. *Hook,* 8 Ga. 354;
Leonard vs. *Storrs,* 31 Ala. 488;
Wray vs. *Jamison,* 10 Humph. 186;
Tillinghast vs. *Champlin,* 4 R. I. 173."

The doctrine is laid down in the most modern work, Alderson on Receivers, Section 4, as follows:

"A court, by appointing a receiver, takes the subject-matter of the litigation out of the control of the parties and into its own hands, and holds it pending the proceeding and until the final disposal of all questions, legal or equitable, involved in the action. Since the receiver's possession is that of the court appointing him, any attempt to disturb it without leave of the court is a contempt of court, and may be punished accordingly."

The language of the Supreme Court of Indiana, in *American Trust and Savings Bank* vs. *McGettigan,* 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345, is a good statement of the recognized principles:

"It is well established that when a court takes possession of the property of an insolvent corporation, and appoints a receiver, such receiver 'is the arm of the court', by which it administers

the trust for the benefit of the creditors. But the court receives such property impressed with all existing rights and equities of creditors, and the relative rank of claims, and the standing of liens remains unaffected by a receivership. Every legal and equitable lien upon the property of the corporation is preserved, with the power of enforcing it:

Gluck and Becker on Receivers, Sec. 6;

Am. & Eng. Ency. of Law, 407;

Woerishoffer vs. *North River etc. Co.*, 99 N. Y. 398-402;

Hubbard vs. *Hamilton Bank,* 7 Met. 340;

Minchin vs. *Second Nat. Bank,* 36 N. J. Eq. 436;

Snow vs. *Winslow,* 54 Iowa 200;

Hale vs. *Frost,* 99 U. S. 389.

And it is as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities as it is to make a just distribution among the general creditors. He is strictly the officer of the court, and it is his duty so to conduct the bsuiness that thet interests of all persons shall be protected. Between them he is indifferent, owing a like duty to all, and for that reason should, as far as possible, see to it that each has an equal opportunity to enforce his claim;

Gluck and Becker on Receivers, Secs. 28, 48;
First Nat. Bank etc. vs. *Barnum etc. Works,* 58 Mich. 315, 317;
Attorney General vs. *Security Life Ins. Co.,* 79 N. Y. 267, 271.

It is true, as asserted by counsel for appellants, that the right of the receiver to bring this action depends upon the right of the creditors represented by him to have united in bringing it, if no receiver had been appointed. The complaint and argument by appellee proceed upon the assumption that the appellee, in bringing it, was acting on behalf of all the creditors to set aside a fraudulent mortgage. In him all the creditors unite."

The case of *Cushing* vs. *Perot,* 175 Pa. St. 66, was an action by an individual creditor of an insolvent corporation to recover on stockholders' liability. The corporation was in the hands of a receiver. The Court held that the creditor could not maintain the action, but that the suit must be brought by the receiver, quoting from *Patterson* vs. *Stewart,* 44 Minn. 84, to the effect that: "Everything becomes assets in his hands which was assets as to creditors, as well as what was assets to the corporation."

The Pennsylvania Supreme Court further says:

"A receiver represents, not only the corporation, but all its creditors; and, as to the latter, it is his duty to secure all the assets available

for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all, and common to all; and hence the receiver, who represents all alike, is the proper party to assert the common right and pursue the common remedy for the common benefit."

The same principles have been affirmed in California, in *Pacific Ry. Co.* vs. *Wade,* 91 Cal. 449, 25 Am. St. Rep. 201, where the Supreme Court say:

"The property of the cable company is in *custodia legis.* The receiver is indifferent between the parties. His possession is the possession of the court, for the benefit of all persons interested, whether named as parties in the action or not, and it cannot be disturbed without the consent of the court. No one claiming a right paramount to that of the receiver can assert it in any action without the permission of the court. No sale can take place, no debt can be paid, no contract can be made, which does not receive the sanction of the court. The receiver, with permission of the court, can do anything the corporation might have done to make the most out of the assets in his hands. It has been held that in a proper case he may settle disputed claims, and compromise with

debtors of the corporation; he may lease other lines of railways, and operate them; he may complete the construction of unfinished lines of railroad, and negotiate loans for the payment of the cost thereof; he may enter into contracts by the terms of which the owners of other roads may use the road under his control at given rates; and he may change the rates agreed upon prior to his appointment, between the company he represents and another railroad corporation:

Code Civ. Proc., Sec. 568;

Beach on Receivers, Secs. 268, 335, 360, 406;

Gluck and Beckers on Receivers, 106, 107, 131, 140, 241;

In re New Jersey etc. Ry. Co., 29 N. J. Eq. 67;

Wiswall vs. *Sampson,* 14 How. 65;

Gibert vs. *Washington etc. R. R. Co.,* 33 Gratt. 685."

Lord Hargreave, in the Matter of Butler's Estate, 13 Br. Ch. (N. S.) 456, says:

"The general proposition is, that the possession of the receiver is that all the parties to the suit, according to their titles. So between the owner and incumbrancers, it for some purposes the possession of the incumbrancers, who have obtained or extended the receiver; as between the owner who has been displaced and a third party, it is the possession of the former.

> The receiver is, in fact, his agent; all the rents are applied to his use, either by paying his debts or paramount charges, or by being handed over to him."

And, in foreclosures, at least, it has long been established law that the possession of a receiver is that of the party who is ultimately successful in the litigation and that his title will relate back to the appointment.

Angel vs. Smith, 9 Ves. 335.

And in *Union Banks* vs. *Kansas City Bank,* 136 U. S. 223, it is said that the effect of the appointment of a receiver is "to put the propery from that time into his custody as an officer of the court, for the benefit of the party ultimately entitled."

In accordance with the principles laid down by these authorities, it would seem clear that the provision of the Deed of Trust, that the financial provisions of Contract "B" shall not pass to a purchaser, do not affect the problem in the least as to the ultimate title or disposition of a portion of the property *after foreclosure.* Accordingly, this Court, in its decree *nisi,* will direct what is to be done with that part of Contract "B", just as it will direct the disposition of the physical property, or Contracts "A" and "C", or the stocks of the Standard Realty Company, or anything else which is pledged under the mortgage as security for the bonds.

Now, a mere trustee has no right to withhold

any property from the receiver. The leading case on that subject (*Miles* vs. *New South Building and Loan Association,* 95 Fed. 919), lays down clearly the procedure as follows:

> "The receiver in this case has authority to make the collection if he is placed in possession of the notes and mortgages. It is true that the assets in the possession of the Company are in part held to secure bonds issued by the defendant corporation, and that these securities cannot lawfully be delivered from that purpose. The securities must be held for the purposes for which they were deposited, and no order will be made to appropriate them to other purposes. The proceeds of the collection by the receiver of these claims will be held as a separate fund, subject to the same trusts that were impressed on the claims by the contracts under which they were held by the company. The company will not only be protected by the order of the court to surrender the assets, but will also be protected by subsequent orders applying the funds arising from the claims in strict conformity to the trusts under which the claims have been held by the company.
>
> "Whether or not the Company is a necessary party defendant to the bill is a question not necessary to be now decided. If it is, and is not made a party, it would be permitted to intervent in the cause by petition, if it became necessary to do so to protect or assert any interest involved in the suit."

III.

When the Equitable Trust Company filed this suit, and receivers were appointed, all of the mortgaged and pledged property passed into the hands of this Court, and the receivers are as much entitled to the possession of Contract "B" as of any other property. Therefore, the injunction should be issued for two reasons: (1) The suit in New York is an attempt to interfere with property constructively in *gremio legis;* (2) The adjudication of the meaning of Contract "B", and its enforcement, have been submitted to this Court.

(1) We take the following propositions to be well settled:

(a) That a receiver is entitled to the possession of *choses in action* pledged to another, when that other merely holds them as security for the creditors of the defendant, or for any specified class of such creditors, and has no beneficial interest in himself.

For instance: in *Miles* vs. *New South Building & Loan Association,* 95 Fed. 919, certain notes and mortgages were in the possession of The American Trust & Banking Company. They had been delivered to this latter Company to secure bonds of the defendant corporation. The receiver demanded possession, and upon refusal to deliver, made a motion for an order directing that they be given up to him.

The Court says:

> "The defense is made that the court has no jurisdiction to proceed in this summary way,

but that a formal suit should be brought to recover the assets, and that on the facts the Company is entitled to retain the possession of the assets. It is stated in *Parker* vs. *Browning,* 8 Paige 388, that, 'if the property is in the possession of a third person, who claims the right to retain it, the receiver must either proceed by suit in the ordinary way to try his right to it, or the complainant shall make such third person a party to the suit, and apply to have the receivership extended to the property in his hands.' This case is often quoted approvingly, but usually with an emphasis in the context on the limiting words that the third person, to make the formal suit necessary, should be one who 'claims the right to retain the property'. This claim of the right to retain it does not mean a bare refusal to surrender it. It means the assertain of some right or interest in the property; not a mere possession or a holding of the property for others who are parties to the suit, or whose rights are protected by the suit. The practice of requiring the surrender of property to the receiver by summary motion or petition is well recognized where it is held by the attorneys, agents, and employes of the defendant. Beach, Rec. 230. The same practice seems not improper where the property in question is held by a defendant in the motion, not for himself, but as trustee, and so, in a sense, as the agent, for those interested in the assets including the defendant in the case. In modern

litigation in equity a defendant's property may be in the possession of hundreds of agents and bailees, holding under various agreements, and it is not reasonable that a receiver appointed of all of the assets should be required to sue each bailee and agent separately, or that all should be made parties to the main suit, should they merely refuse to surrender the assets. When a receiver is appointed for a corporation doing business by agents in many states, to make the appointment serve its purpose the court should have jurisdiction to require a surrender of the property to the receiver. The order in such cases requiring the delivery of the property to the receiver does not affect the title to the property, nor even the right of possession. It only places the assets in the custody of the officer of the court, who holds them for those ultimately shown to be entitled to them. *Union Bank* vs. *Kansas City Bank,* 136 U. S. 223, 10 Sup. Ct. 1013. The decision of the motion affects no beneficial interest in the property. When the motion is disallowed, it is not a thing adjudged as to the ownership of the property against the receiver; nor is the granting of the motion conclusive against the defendant in the motion as to any title or interest in the property. In the former case the receiver could bring a formal suit, and in the latter the defendant in the action could sue the receiver, or intervene in the litigation. This summary proceeding is not opposed to the constitutional provision that no one

shall be deprived of his property without due course of law, because the receiver does not become vested with any beneficial title to the property. Beach Rec. 209, 230; *Brandt* vs. *Allen* (Iowa) 40 N. W. 82. In litigations involving the receiverships and settlements of insolvent corporations it is desirable that the procedure be concentrated in one cause, so far as practicable. In *White* vs. *Ewing,* 159 U. S. 46, 15 Sup. Ct. 1018, it was held, in a suit to distribute the assets of an insolvent corporation, that an ancillary suit or ancillary suits might be brought in the same case by the receiver against 130 persons who were indebted to the corporation. There seems to be no good reason why persons in possession of the assets of the corporation cannot be brought before the court by summary petition, and, if they admit the possession, and show no beneficial claim or title in themselves, be required to surrender such assets to the receiver. The Company claims no ownership in the assets. Its claim is as trustee for others. The main suit is to settle an insolvent corporation, and the rights of all of the beneficiaries in the trust represented by the Company can be fully protected by the Court in the case in which the receiver was appointed."

This case was quoted with approval in *Morrill* vs. *American Reserve Bond Co.,* 151 Fed. 305. In that case, under the laws of Missouri, large amounts of mortgages had been deposited with the State Treas-

urer, as security for the bonds issued by the defendant. The Circuit Court, by Judges Sanborn and Hook, held that the receiver was entitled to them, even as against the State statute. The Court quotes with approval the language of *Illinois Steel Co.* vs. *Putnam*, 68 Fed. 515, 15 C. C. A. 556, as follows:

> "Where a bill in equity brings under the direct control of the court all the property and estate of the defendants, or of certain named defendants, or certain designated property of all or of either of the defendants, to be administered for the benefit of all entitled to share in the fruits of the litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may properly be held in *gremio legis*. The actual seizure of the property is not necessary to produce this effect, where the possession of the property is necessary to the granting of the relief sought."

The principle of these cases is further upheld in *Robinson* vs. *Mutual Reserve, etc., Co.*, 162 Fed. 800.

IV.

Even if it be conceded that the plaintiff has a right of action, that action at this time is an interference with the property in the hands of the receivers, because the amount of the recovery depends: (1) Upon the earnings of the Western

Pacific property, and (2) The amount which may be realized from the sale of that property.

1. The *primary* financial obligation of the Denver and Rio Grande is to purchase semi-annually the promissory notes of the Western Pacific to the amount "by which the gross earnings and income of the Western Pacific during the preceding fiscal half year shall be insufficient to meet the sum" of operating expenses, taxes, interest on the First Mortgage Bonds, sinking fund, any other sum which may be necessary to assure the continued and efficient operation of the property, tax on the bonds, and interest on any indebtedness other than said First Mortgage bonds. (Article II, Section 3, Subdivision a.)

2. The Denver and Rio Grande *and the Western Pacific jointly and severally* agree to pay to the Trustee, *out of the purchase price of the notes,* an amount equal to the difference between the sum actually appropriated by the Western Pacific "out of its earnings and other income," and the amount of the interest. (Article II, Section 3, Subdivision b.)

3. The Denver and Rio Grande agrees to pay *to the Western Pacific,* each half year, an amount sufficient to make up any deficiency in earnings for operating expenses, taxes, any other charge necessary to insure its continuous and efficient operation, taxes on bonds, and interest on any other debt. (Article II, Section 3, Subdivision c.)

4. The Denver and Rio Grande promises to pay to the Trustee sufficient money, "with the amounts then already paid by the Pacific Company to its fiscal agents," to make up the interest and sinking fund. (Article II, Section 3, Subdivision d.)

5. The Denver and Rio Grande agrees that if the Western Pacific is for any reason unable to deliver the promissory notes, the money, *non obstante,* shall be paid; but the Denver and Rio Grande shall not thereby waive the right to enforce the delivery of the notes. (Article II, Section 3, Subdivision e.)

6. The Denver and Rio Grande agrees that if at any time the Western Pacific is unable to issue the promissory notes, by reason of the fact that the issued capital stock of the Western Pacific is insufficient to warrant it, then the Denver and Rio Grande will subscribe for enough new stock to satisfy the law. (Article II, Section 3, Subdivision f.)

7. The Western Pacific agrees that it will execute the notes for any advancements made by the Denver and Rio Grande, and if for any reason it is impossible to issue them at the time of such advancements, it will take such corporate action as may be necessary to give validity to the notes. (Article III, Section 4.)

8. The Western Pacific agrees to "faithfully apply all its gross earnings and income, as the same shall accrue, to the following purposes and in the following order of priority":

(1) Operating expense.

(2) Taxes.

(3) Interest on First Mortgage Bonds.

(4) Sinking Fund.

(5) Any other charge necessary to assure the continued and efficient operation of the property.

(6) Taxes on the bonds.

(7) Interest on any other indebtedness.

(8) To the payment of the promissory notes of the Denver and Rio Grande.

(Article III, Section 5.)

9. The Western Pacific agrees that whenever it earns a surplus above the matters specified in the first seven subdivisions of the last paragraph, then the Denver and Rio Grande shall retain all traffic balances, and apply them *pro tanto* on the promissory notes. (Article III, Section 7.)

It seems perfectly clear that *all* of these provisions are mutually dependent. It is, of course, a cardinal rule in the interpretation of contracts, that the intention is to be gathered, not from detached portions of the contract, but from the whole of it.

8 Cyc, 579 (and authorities cited).

So, taking Contract "B" as a whole, the meaning is clear that it creates a double obligation:

(a) On the part of the Western Pacific to apply all earnings over operation to interest and taxes.

(b) On the part of the Denver and Rio Grande to make up the deficiency.

Now, it is evident that any money advanced by the Denver and Rio Grande to make up this deficiency, constitutes a debt in its favor against the Western Pacific, which the latter corporation agrees to evidence by its promissory notes. It is equally evident that, taking the contract as a whole, the true measure of the Denver and Rio Grande's liability is the difference between the Western Pacific surplus earnings and the amount of the interest and sinking fund. Accordingly, in the dependent suit, the Denver and Rio Grande has the right to compel the application of those surplus earnings to a reduction of its liability. Now, it is quite apparent that the earnings of the Western Pacific are in the hands of the receivers, and the disposition of those earnings is a matter purely for this Court. It would seem to follow, inevitably, that any action, the determination of which depends upon the disposition of those earnings, is an interference with property in the hands of the receivers, and with a matter which is submitted to this Court by the filing of the Bill.

In this connection, it should not be forgotten that the Deed of Trust specifically provides that surplus earnings are subject to the mortgage, and are applicable to the payment of the interest, pending receivership.

(*Deed of Trust,* Article V., Section 5.)

Now, if the bondholders are entitled to have the net earnings of the Western Pacific during the receivership applied to this interest, it would seem apparent that the liability of the Denver and Rio Grande is dependent directly upon the amount of those earnings which is legally applicable to the interest. In other words, before the *amount* of the Denver's liability can be fixed for current interest, this Court must determine how much of the money in the hands of the receivers shall be applied to the payment of interest. And it is equally certain that that amount depends upon many things necessarily within the purview and direction of this Court—such, for instance, as preferential claims, necessary betterments, expenses of the suit and the receivership—besides the contingencies arising from the conduct of the business itself.

Moreover, the dependent bill asks for an interpretation of Contract "B". If the New York Court should determine that the true meaning of Contract "B" is that the bondholders, or the Trustee, are entitled to the earnings of the Western Pacific, before the Denver is compellable to pay anything, that would be an adjudication directly upon property in the custody of this Court.

Now, it is thoroughly well settled, that if a receiver pays out money, even by the judgment or order of a court other than one appointing him, it will not be allowed, but will be surcharged of his account.

Alderson on Receivers, Section 201.

In *De Winton* vs. *Mayor of Brecon,* 28 Beav. 200, Lord Romilly says: "It is always to be remembered that the receiver in this case would never have got a penny except by the order of the Court enabling him to receive it, and entitling him to receive it, and entitling him to give a good discharge to the person who paid it; and, consequently, it is strictly money belonging to the Court of Chancery, and the receiver can only discharge himself by paying it in obedience to the direction and order of *that* court."

2. So far as the *future* liability of the Denver and Rio Grande is concerned, while the Deed of Trust is not free from ambiguity, still it is clear: (a) That its liability is not determinable at this time, and (b) it is dependent upon the amount realized from the sale of the property in the foreclosure suit.

The avowed purpose of the Bill in this case is to secure a sale of the property of the Western Pacific. That sale may realize $50,000,000 and interest, or it may result in a less sum. If it brings the full value of the bonds, then, of course, there is no liability. If it brings less, then the deficiency is the measure of that liability. In either event, however, the liability is dependent upon the result of the outcome of the action in this case, and the liability is contingent, until this case is determined.

To put it differently, the primary fund for the payment of the principal of the bonds is the property of the Western Pacific; the *primary fund* for the payment of the interest is the surplus earnings of

the Western Pacific; and to say that any action which depends for its result upon the action of this Court upon those two primary funds, is not an interference with those funds, is simply to trifle with language.

Thus, in *Pennsylvania Steel Co.* vs. *New York City Ry. Co.,* 198 Fed. 750, the Metropolitan Company had guaranteed the bonds of the Second Avenue Company. The bondholders of the latter company presented their claim to the receiver of the former, and they were disallowed by the Master, for the reason that the claim was contingent upon the outcome of the foreclosure sale. The Circuit Court of Appeals for the Second Circuit say:

> "Assuming, however, that the bondholders may base their demand upon the assumption clause, still it does not carry us far. It appears from the authorities that such a covenant, even if absolute in form, will be treated as conditional. Thus in *Farmers' Loan, etc., Co.* vs. *Central Park, etc., R. Co.,* 193 Fed. 963, this court said in respect of an assumption provision in a lease also identical with the present one:
>
> > 'But even assuming with appellant that the lease of 1892 does contain an assumption of the Central Park Company's funded debt and assuming further, that this case is governed wholly by the law of New York as declared by its highest court, there is nothing in the evidence to show that the Metropolitan Company ever assumed any higher obligation than

one to hold the Central Park Company harmless from the consequence of foreclosure, the pledged property remaining always the primary fund for the payment of the mortgage. "The giving of a covenant by the grantee does not work a novation of the mortgage debt. It does not make the debt his own, except in respect to the estate." Matter of *Wilbur* vs. *Warren,* 104 N. Y. 198, (10 N. E. 263), citing *Butler* vs. *Butler,* 5 Ves. 534.

If, then, the mortgaged property be the primary fund for the payment of the mortgage, it necessarily follows that this assumption covenant, if constituting a promise for the benefit of the mortgage bondholders, was merely a promise to pay any deficiency after exhausting the mortgage security. Granting that the promise would be for the benefit of the bondholders and that it would support a direct action by them, would not change its conditional character. The Metropolitan Company was liable to the bondholders only as it was liable to the Second Avenue Company itself. *Vrooman* vs. *Turner,* 69 N. Y. 280; 25 Am. Rep. 195.

And if the bondholders had a conditional right of action upon the assumption clause, i. e., if they could after exhausting the security of the mortgage, their demand was too uncertain when presented—and is too uncertain now—to constitute a provable claim in an equity receivership.

cause within the principles stated in the Express Company's Appeal. As shown in the statement of facts, no foreclosure decree has ever been entered and there is nothing to show that there ever will be any deficiency after using up the mortgage security. Assuming the assumption covenant to be enforceable, it is entirely uncertain what, if anything will ever be due upon it."

V.

The res, of which this Court has acquired jurisdiction by the filing of the bill, is the whole subject matter of the deed of trust, and is not confined to the physical property.

It seems to be settled law, that that Court, which first acquires jurisdiction of the subject matter of a suit, will retain it for the decision of all matters connected with that suit, or necessary to a complete determination of it. It is equally well settled, that this court of primary jurisdiction will enjoin either of the parties from proceeding in any other jurisdiction to try any of the questions connected with the controversy. Much of the argument in this case has proceeded upon the theory that the question at issue is whether or not the *proceeds* of claims against the Denver and Rio Grande are involved in the foreclosure, and whether or not the so-called *financial* part of the agreement will pass to a purchaser. But the rule is by no means so narrow in its scope. Thus, in *Farmers' Loan and Trust Co.* vs. *Lake Street Elevated Railroad Co.,* 177 U. S. 51, an action had been brought in the Federal Court

to foreclose a mortgage. The Railroad commenced an action in the State Court, alleging that the Trust Company was incapacitated, by reason of its failure to comply with State statutes, and asking that it be removed as Trustee, and enjoined from foreclosing. The State courts held with the Railroad; but on Writ of Error, the Supreme Court of the United States reversed the Supreme Court of Illinois, saying:

> "The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.
>
> *Nor is this rule restricted in its application to cases where property has been actually seized* under judicial process before a second suit is instituted in another court, *but it often applies* as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature *where, in the progress of the litigation the court may be compelled to assume the possession and control of the property to be affected.* The rule has been

declared to be of especial importance in its application to Federal and state courts.

Peck vs. *Jenness,* 7 How., 612, 12 L. Ed. 841;

Freeman vs. *Howe,* 24 How. 450, 16 L. Ed. 749;

Moran vs. *Sturges,* 154 U. S. 256, 38 L. Ed. 981, 14, Sup. Ct. Rep. 1019;

Central National Bank vs. *Stevens,* 169 U. S. 432, 42 L. Ed., 807, 18 Sup. Ct. Rep., 403;

Harkrader vs. *Wadley,* 172 U. S. 148, 43 L. Ed., 399, 19 Sup. Ct. Rep. 119.

We think that this salutary rule is applicable to the present case. The bill filed in the Federal Court looked to the enforcement of the trusts declared in the mortgage, the control of the railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company. Such a proceeding necessarily involves the right of the complainant trustee to act as such, and the determination of the controversy in respect to the ownership of the bonds and to the power of a majority of the bondholders, by an agreement with the stockholders, to dispense with an enforcement of the provisions of the mortgage by judicial proceedings. These questions are not for our consideration, unless and until they are brought before us on

appeal from a final decree of the court whose jurisdiction was first legally invoked to determine them."

In *Freeman* vs. *Howe*, 24 How. 450, the Supreme Court quotes the following language from *Peck* vs. *Jenness*, 7 How. 624:

> "It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court."

In *Starr* vs. *Chicago, etc., Ry. Co.*, 110 Fed., 3, the Circuit Court had determined that a statute fixing maximum freight rates was unconstitutional. The Attorney General brought an action for the recovery of penalties under the Act. Judge Sanborn laid down the following principles:

> 1. The Federal courts must determine for themselves the limit of their jurisdiction, and the Supreme Court of the United States is the final arbiter in all questions of this nature. A renunciation of this power or a failure to discharge this duty would be fatal to our system

of government. It would withdraw the keystone of the arch.

U. S. vs. *Peters,* 5 Cranch, 115, 3 L. Ed., 53;

Freeman vs. *Howe,* 24 How., 450, 459, 460, 16 L. Ed. 749;

"2. Wherever a federal court and a state court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. This rule applies equally to civil and criminal proceedings.

Harkrader vs. *Wadley,* 172 U. S., 148, 164, 19 Sup. Ct. Rep. 119, 43 L. Ed., 399;

Sharon vs. *Terry,* (C. C.), 36 Fed. 337;

Wallace vs. *McConnell,* 13 Pet. 135, 10 L. Ed., 95;

Clark vs. *Five Hundred and Five Thousand Feet of Lumber,* 65 Fed., 226, 12 C. C. A. 628, 24 U. S. App., 509;

Gates vs. *Buckeye,* 12 U. S. App. 69, 4 C. C. A., 116, 53 Fed., 961;

Chittenden vs. *Brewster,* 2 Wall, 191, 17 L. Ed., 839;

Orton vs. *Smith,* 18 How., 263, 265, 15 L. Ed. 393;

Union Trust Co. vs. *Rockford R. I. & St. L. R. Co.,* 6 Biss. 197, 24 Fed. Cas. 704 (No. 14,401);

Owens vs. *Railroad Co.* (C. C.) 20 Fed., 10;

Union Mut. Life Ins. Co. vs. *University of Chicago,* (C. C.) 6 Fed. 443;

Freeman vs. *Howe,* 24 How. 450, 16 L. Ed. 749;

Peck vs. *Jenness,* 7 How. 612, 622, 825, 12 L. Ed. 841;

Taylor vs. *Carryl,* 20 How. 583, 596, 597, 15 L. Ed. 1028;

Wisewall vs. *Sampson,* 14 How. 52, 14 L. Ed. 322;

Covell vs. *Heyman,* 111 U. S. 176, 4 Sup. Ct. Rep. 355, 28 L. Ed. 390;

Heidritter vs. *Oilcloth Co.,* 112 U. S. 294, 302, 5 Sup. Ct. 135, 28 L. Ed. 729;

Riggs vs. *Johnson Co.,* 6 Wall. 166, 196, 18 L. Ed. 768;

Central Trust Co. of New York vs. *South Atlantic & O. R. Co.* (C. C.) 57 Fed. 3.

"3. The foregoing principle is so indispensable to the harmonious working of our systems of federal and state jurisprudence that neither the eleventh amendment to the constitution, nor section 720 of the Revised Statutes, which pro-

hibits the issue by a court of the United States of a writ of injunction to stay proceedings in any court of a state, can be permitted to interfere with its maintenance. The court which first obtains jurisdiction of the subject-matter and of the necessary parties to a suit may, and if it discharges its duty it must, if necessary, issue its injunction to prevent any interference by any one with its effectual determination of the issues, and its administration of the rights and remedies involved in the litigation."

French vs. *Hay,* 22 Wall. 250, 22 L. Ed. 857;

Dietzsch vs. *Huidekoper,* 103 U. S. 494, 26 L. Ed. 497;

Moran vs. *Sturges,* 154 U. S. 256, 14 Sup. Ct. Rep. 1019, 38 L. Ed. 981;

Fisk vs. *Railroad Co.,* 10 Blatchf. 518, Fed. Cas. No. 4830;

Garner vs. *Bank,* 33 U. S. App. 91, 16 C. C. A. 86, 67 Fed. 833;

Terre Haute & I. R. Co. vs. *Peoria & P. U. R. Co.* (C. C.) 82 Fed., 943.

This latter case was affirmed by the Supreme Court *sub nomine* in *Prout* vs. *Starr,* 188 U. S. 537, where it is said:

"The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the

very matters that stood for judgment in the Federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court.

Peck vs. *Jenness,* 7 How. 625, 12 L. Ed. 846;

Chittenden vs. *Brewster,* 2 Wall. 191, 17 L. Ed. 839;

Orton vs. *Smith,* 18 How. 263, 15 L. Ed. 393.

The jurisdiction of the circuit court could not be defeated or impaired by the institution by one of the parties of subsequent proceedings, whether civil or criminal, involving the same legal questions in the state court.

Harkrader vs. *Wadley,* 172 U. S. 148, 166, 43 L. Ed. 399, 405, 19 Sup. Ct. Rep. 119, 126."

In *French* vs. *Hay,* 22 Wall. 250, the Supreme Court say:

"The court having jurisdiction in *personam* had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.

Watts vs. *Waddle,* 6 Pet. 391;
Lewis vs. *Darling,* 16 How. 1.

> Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jursdiction was exhausted. While the jurisdiction lasted it was exclusve, and could not be trenched upon by any other tribunal.
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> *Hagan* vs. *Lucas,* 10 Pet. 400;
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> *Taylor* vs. *Carryl,* 20 How. 583 (61 U. S. XVI 1028);
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> *Freeman* vs. *Howe,* 24 How. 450 (65 U. S. XVI 749);
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> *Taylor* vs. *Taintor,* 16 Wall. 370 (83 U. S. XXI 290).

Now, it surely cannot be said that Contract "B" is not part of the property pledged by the Deed of Trust as security for the bonds. This Court has acquired the same right, and it has the same duty, to interpret and enforce the provisions of the Deed of Trust concerning Contract "B," as any other provision of the instrument upon which the suit is based. Accordingly, the construction of that provision of the Deed of Trust, to the effect that Contract "B" shall not be delivered to a purchaser, is before this Court for interpretation and adjudication.

(Deed of Trust, Article V., Section 9.)

That provision is by no means so free from doubt or obscurity as Counsel seem to think. It provides

that as long as the Denver is liable to payments on interest or sinking fund, the Contract shall not be delivered to a purchaser "although such purchaser or purchasers may have succeeded to any or all the interests and rights of the Railway Company thereunder." This provision, as a matter of fact, involves a number of considerations:

1. Does it mean that immediately upon a sale, the bondholders are entitled to a lump sum, which will amount to a capitalization of interest upon the deficiency for the term the bonds still have to run?

2. Does it mean that the Denver will be required to pay full 5% upon the deficiency, or 5% less the earnings of the Western Pacific in the hands of a purchaser?

3. How far is the Denver entitled to insist that a purchaser take the property subject to the burdens of Contract "B"?

4. How far can the bondholders or the Trustee establish Contract "B" as a lien upon the properties of the Denver and Rio Grande?

5. If Contract "B," by virtue of the pledge under the Deed of Trust is a lien upon the properties of the Denver, what is the rank of that lien?

6. Should the funds in the hands of the receivers be applied to interest, and the consequent reduction of the liability of the Denver and Rio Grande?

7. What is the meaning of the provision of the Deed of Trust that the proceeds of a sale shall be applied "to the payment of such principal and interest

without preference or priority of principal over interest or of interest over principal, or of any installment of interest over any other installment of interest, ratably, according to the aggregate of such principal and the accrued and unpaid interest"?

(Deed of Trust, Article V, Section 13.)

8. What is the meaning of the provision of the Deed of Trust that the net income during receivership is primarily pledged and applied to the payment when due, of the interest and principal of said bonds in the order of priority declared in Section 1 of Article Five hereof?

(Deed of Trust, Article IX.)

9. What is the meaning of the provision of the Deed of Trust that the income shall be applied first to the interest, and then to the principal?

(Deed of Trust, Article II, Section 1.)

10. And finally, what is the effect of the very pledge itself of Contract "B," which is referred to in the Deed of Trust as an agreement "to purchase unsecured obligations of the Railway Company to such amounts as will yield moneys sufficient, *after application of the proper, available income of the Railway Company,* and other moneys appropriated by it for the purpose, to provide for the payment of the Railway Company's operating and maintenance expenses, taxes, and interest upon the bonds secured hereby, the annual payment to be made into the sinking fund provided for hereby, any other

expense that may be necessary to assure the continued operation of the Railway Company's property, etc."?

(Deed of Trust, Granting Clause, Section 6, Sub. 2.)

These are all matters which arise under the Deed of Trust, which is the subject matter of this action. But all of these questions are also necessarily involved in any suit on Contract "B," against the Denver and Rio Grande, under the authorities cited above, that this Court, having acquired jurisdiction to determine these questions, will prevent the Plaintiff from litigating them in another forum.

VI

Any moneys secured from the Denver and Rio Grande as contributions to the Interest Fund are an asset of the receivership.

While it is true that the money paid by the Denver goes to the Trustee in the first instance, still the Trustee is a mere custodian. Section 8 of Article VI of Contract B provides that these funds are to be paid to the fiscal agents of the Western Pacific at New York and San Francisco, for the benefit of the bondholders. In other words, the Trustee, at most, is a mere collection agent. The money received from the Denver is strictly the property of the Western Pacific, to be paid to its fiscal agents for the payment of its debts. It is true that the Contract and Deed of Trust provides that these funds shall not be available for any purpose other than the

payment of the interest, but that does not render them any the less assets of the Western Pacific. The Contract provides for the creation of a fund in the hands of the fiscal agent for interest. That fund has two sources; one is the earnings of the Western Pacific; the other is the amount of the deficiency to be made up by the Denver and Rio Grande. And it is difficult to see how one is any the less an asset of the defendant than the other.

VII.

The first mortgage or deed of trust of the Western Pacific, by virtue of the pledge of Contract "B", amounts to an equitable lien upon the properties of the Denver and Rio Grande, and the bill in this case is sufficient to establish, and if necessary, foreclose that lien.

Section 13 of Article VI of Contract "B," reads as follows:

> "This agreement shall, except as hereinafter provided, continue in full force and effect, and be binding upon all the parties hereto, from the date hereof until all of said $50,000,000, face value, of First Mortgage Five Per Cent. Thirty Year Gold Bonds of the Pacific Company shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the First Mortgage of the Pacific Company, and shall run with the railways of the said several Railway

Companies, parties hereto, into whosoever hands the same may come; and this agreement and the provisions thereof shall be so construed that any person or persons, corporation or corporations, which may at any time acquire in any manner any of the said several railways of the parties hereto, shall be held and be deemed to have expressly agreed by virtue of the act or acts, deed or deeds, or other instrument of transaction by or through which the said person or persons, corporation or corporations, may immediately or indirectly have acquired the said several railways, or any thereof, to and with each and every of the parties hereto to observe and perform all of the terms required by this agreement to be perfromed or to be observed by the party hereto, from whom, immediately or indirectly, the said person or persons, corporation or corporations, may have acquired the said railways or railway, and the said person or persons, corporation or corporations, shall be held to be bound by an express contract with the parties hereto and by and upon an express trust to perform and observe as aforesaid all the terms hereof, including all acts and things that may be necessary to preserve in full force the several obligations and agreements herein established or contained for the full term hereof; and the obligations and provisions of this agreement shall be deemed to be part of the consideration of any contract or contracts, of whatever form or nature the same may be, and of any other

transaction by which any person or persons, corporation or corporations, may acquire or undertake to acquire the said several railways or any of them. Each of said Railway Companies parties hereto further covenants and agrees with all the other parties hereto that if it shall at any time during the continuance of this agreement, by lease, sale, consolidation or otherwise, convey or in any manner transfer its property or its rights and franchises in or to all or any of the premises affected hereby, then any instrument containing or setting out any such lease, sale, consolidation or other conveyance, shall contain a covenant that the same is made subject to all the provisions of this instrument, and that its lessee, grantee, successor or other transferee, as the case may be, and any and every person or corporation claiming under any such lessee, grantee, successor or other transferee, shall, by the acceptance of such instrument and by the acceptance of such lease, grant, consolidation or other conveyance, become bound to perform and observe all of the terms hereby required to be performed or observed by the party making such lease, grant, consolidation or other conveyance, including all acts and things that may be necessary to preserve in full force the several obligations and agreements herein established or contained for the full term hereof."

In the case of *Ketchum* vs. *St. Louis,* 101 U. S., 306, the Supreme Court say:

"We are of opinion that no insuperable obstacle exists in the way of a court of equity giving effect to this agreement or contract between the parties as against those whom the law charges with notice thereof. The relief granted by the decree seems to be in accordance with established rules in such cases.

In *Legarde* vs. *Hodges,* Lord Thurlow said: 'I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raised a trust. These persons have so claimed; and, therefore, this is a pure trust estate,' and they must be declared trustees. 1 Ves., Jr., 478. In the report of that case in 3 Bro. Ch., 531, the Chancellor says: 'I take the doctrine to be true, that when parties come to an agreement as to the produce of land, the land itself will be affected by the agreement.' Upon rehearing, the former decree was affirmed. 4 Bro. Ch. 422.

In re Strand Music Hall Co., 3 De. G. J. & S., 147, the question arose whether that company had created a valid charge on their real property. 'There can, I think,' said Lord Justice Turner, 'be no doubt that it was intended by these agreements to create a charge upon the property of the company, but it was said on the part of the official liquidator that this intention was not well carried into effect. I apprehend,

however, that where this Court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it.'

The doctrine is thus stated by Mr. Justice Story, in his Equity Jurisprudence, Vol. 11, Sec. 1231: 'Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice; for it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust.' The author cites, in support of these views, *Legard* vs. *Hodges (supra).*

See also, in *Pinch* vs. *Anthony,* 8 Allen, 536, 'It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers or who take the estate on which the lien is agreed to be given, with notice of the stipulation. Such

agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it.'

In the recent work of Mr. Jones on Mortgages, Vol. 1, Sec. 162, the author remarks: 'In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common law mortgage, are often used by parties for the purpose of pledging real property or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are, therefore called equitable mortgages.' So, also, in his treatise on Railroad Securities, p. 57, the same author says: 'An agreement of a company to set apart specific earnings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitapble lien or charge.' Willard, Eq. Jur., 462; *Watson* vs. *Wellington,* 1 Russ & M., 604; *Yeates* vs. *Groves,* 1 Ves., Jr., 280; *Lett* vs. *Morris,* 4 Sim. 607, Ex parte Alderson, 1 Madd. 53."

In *Higgins* vs. *Manson* 126 Cal., 469, the Supreme Court of California quotes *Howard* vs. *Iron, etc., Co.,* 62 Minn., 298, as follows:

"'Every express agreement in writing whereby the party clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property, which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged.' (Citing in support thereof, 2 Pomeroy's Equity Jurisprudence, Secs. 1235, 1236; *Payne* vs. *Wilson,* 74 N. Y., 348; *Daggett* vs. *Rankin,* 31 Cal., 321; *White Water, etc., Co.* vs. *Vallette,* 21 How., 414."

In *Walker* vs. *Brown,* 165 U. S., 164, the Supreme Court say:

"It is well settled, said the Court, in *Pinch* vs. *Anthony,* 8 Allen, 536, 'that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal estate of which he is the owner or possessor, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons, who are either volunteers or who take the estate on which the lien is agreed to be given, with notice of the stipulation.' The subject was very fully reviewed with reference to the English and American authorities in *Ketchum* vs. *St. Louis,* 101 U. S., 306

(25:999), where the language just cited was approved, and that ruling was considered and reaffirmed, during this term, in *Fourth Street Nat. Bank* vs. *Yardley,* 165 U. S. 634. Pomeroy in his work on Equity Jurisprudence (Vol. 3, p. 1235), condenses and states the general result of the authorities on the subject, as follows:

'The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice * * * The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done, that which ought to be done.' "

It will be seen, under these authorities, that Contract "B" is clearly an agreement, by the terms of which the railroads of the Denver and Rio Grande and the Rio Grande Western (now consolidated into the Denver and Rio Grande), are impressed with liens:

1. In favor of the bondholders of the Western Pacific, for at least interest and sinking fund;

2. In favor of the Western Pacific itself for other expenses necessary to its maintenance.

But this agreement, so constituting a lien upon the Denver and Rio Grande, is made a part of the security of the First Mortgage of the Western Pacific. *This clearly constitutes this First Mortgage of the Western Pacific, a mortgage also upon the railroads of the Denver and Rio Grande.* It is, of course, well settled, that where a deed, lease, or other instrument is incorporated in a mortgage by reference, the two instruments should be read and construed together.

27 Cyc., 1135.

It is equally well settled, and indeed, is provided by the statute in California, that a mortgage cannot be foreclosed piecemeal, but that the decree must settle and adjust all the equities.

Code Civ. Proc. of California, Sec. 726.

The object of this enactment is explained in *Ould* vs. *Stoddard,* 54 Cal., 615, as follows:

> "It is not difficult to discover the policy which dictated the enactment of this statute. The tendency of modern legislation is to prevent a multiplicity of suits, and no one doubts the wisdom of it. In order to give this statute the force and effect which the Legislature intended it should have, we must hold that by

> prosecuting an action upon the note secured by the mortgage to final judgment, the plaintiff has exhausted his remedy upon both the note and the security. To hold otherwise would be to hold that there may be two actions, where the statute declares there can be but one."

So, it is held that if one has a mortgage upon two pieces of property, and forecloses only as to one, he waives his right to proceed upon the other. Thus, in *Hall* vs. *Smott*, 80 Cal., 348, a debt was secured by a mortgage on one piece of land, and a deed in the nature of a mortgage to another piece. A suit was brought to foreclose on both. A demurrer was sustained as to the land secured by the deed, and plaintiff then voluntarily dismissed it out of his complaint.

The Supreme Court say, page 353:

> "The Code of Civil Procedure, Section 726, provides that there can be but one action for the recovery of any debt secured by mortgage upon real estate. In applying this section in *Ould* vs. *Stoddard*, 54 Cal., 613, it was held that a mortgagee who commenced and prosecuted a suit to final judgment in the state of Ohio, upon a promissory note secured by a mortage upon land in this state, exhausted his remedy upon both the note and security, and could not thereafter maintain a suit to foreclose the mortgage.
>
> It is therefore apparent that as the deed in controversy was for the benefit of the same

parties as those to the deed of December 20, 1882, and to secure the same indebtedness, although upon different property, it should by appropriate allegations in the amended complaint in *Arnott* vs. *Waterhouse,* in which the last-mentioned deed was foreclosed, have been included and foreclosed. It is no excuse to say that the court sustained a demurrer to the complaint in which an effort was made to include it, as we are bound to presume that the ruling of the court was correct and the complaint insufficient to make evidence the necessary connection between the two deeds.

The plaintiffs in that suit exhausted their remedy upon their security, and by failing to include the deed in controversy, waived any security afforded by it, and the lien thereby given was nullified. (*See Mascaral* vs. *Raffour,* 51 Cal. 242.)"

And it is well settled law that the remedy of a mortgagee is governed by the *lex fori.*

Willard vs. *Wood,* 135 U. S., 309;
Johnson vs. *Wilson,* 180 U. S. 440.

So that, not only is the present action sufficient to foreclose this equitable mortgage on the Denver and Rio Grande, but no other action can be maintained. In other words, if a decree should be entered here, foreclosing this mortgage, without enforcing the claim against the D. & R. G., that decree would be a bar to any subsequent action.

But, it seems highly probable that the true interpretation of the above quoted provision of Contract "B" gives the Denver and Rio Grande an equitable lien upon the property of the Western Pacific. If Contract "B" were not a part of the First Mortgage, this lien, of course, would be subordinate to that instrument. But the lien upon the properties of the Denver is at all times dependent for its amount, at least, upon the provisions of Contract "B" to the effect that the Western Pacific's earnings are to be applied to the interest and sinking fund, after the operating expenses are paid, and thus to reduce the amount of the Denver's liability. In other words, we come back again to the proposition, that the Denver's liability, which is secured by an equitable mortgage on its railroads, is not for any fixed definite sum, but for the deficiency in the earnings of the Western Pacific. Accordingly, in arriving at the nature and amount of the lien upon the property of the Denver, the Court is bound to examine and interpret the provision of Contract "B" that its provisions run with the railroads of the Western Pacific, and to determine the questions as to how far a purchaser of the latter's property at foreclosure sale, is bound to apply its earnings to mitigate the rigor of the Denver's penalty.

In this connection, we desire to call attention to the litigation in the case of the Wabash Railroad, as applicable to many of the questions, particularly of procedure, involved here.

In 1862, the Toledo & Wabash issued and sold

$600,000.00 par value of "equipment bonds." This paper was not secured by any mortgage, deed of trust, or other direct lien upon any property. The Toledo and Wabash was afterwards consolidated, with other railways in the States of Ohio, Indiana, Illinois, and Missouri, into the "Wabash System." This consolidation was by virtue of the corporation laws of the several states. The constituent companies, and finally the consolidated company, created certain bond issues, secured by mortgages and deeds of trust. Upon default in payment of the interest upon one of these issues, an action was brought in 1875, a receiver appointed, and a decree directing the sale of the property was made and entered. A sale was made to a bondholders' committee, which formed the Wabash, St. Louis and Pacific Railway Company, and the property was conveyed to this new corporation by the committee. One Ham then brought an action in the United States Circuit Court for the District of Indiana. Ham was the owner of certain of these equipment bonds; and he contended that they constituted a lien upon so much of the property as had formerly belonged to the Toledo & Wabash, and that he was entitled to follow that property through the consolidation, the decree, and the sale. The Circuit Court held with him, but the Supreme Court reversed the decree, declaring that the equipment bonds did not constitute a lien.

Wabash, etc., Ry. Co. vs. *Ham,* 114 U. S. 587.

While this litigation was pending in the Federal

Courts, one Compton brought his action in the State Court of Ohio. He was also the owner of a large block of these equipment bonds. He made the same contentions as did Ham, and the *Nisi Prius* Court of Ohio gave him judgment. Upon appeal, this judgment was affirmed by the Supreme Court of Ohio, although that Court was constrained to definitively align itself in opposition to the authority of the Supreme Court of the United States in the Ham case.

Compton vs. *Wabash, etc., Ry. Co.,* 16 N. E. 110.

One of the Justices of the Supreme Court of Ohio, however, dissented, holding himself bound both by the authority and reasoning of the Ham case.

Compton vs. *Wabash, etc., Ry. Co.,* 18 N. E. 380.

This, then, was the state of the record:

1. The United States Circuit Court for Ohio had by its decree of foreclosure, sold the whole property;

2. The United States Circuit Court for Indiana, in the Ham case, had decreed the equipment bonds to be a lien, but this decree had been reversed by the Supreme Court of the United States, and the bonds declared *not* to be a lien;

3. The Supreme Court of Ohio, in the Compton case, had decreed that the bonds *were* a lien, and, ordered the property sold to satisfy them.

James R. Jessup and Edward H. Dixon, trustees under a mortgage of the reorganized Wabash System brought a suit in the United States Circuit Court of Ohio for the foreclosure of their mortgage. This action was pending and the reorganized road was in the hands of a receiver at the time of the decision of the Supreme Court of Ohio in the Compton case. After the rendition of the judgment, but before execution, the complainants obtained an order of the United States Circuit Court, based upon Section 8 of the Act of Congress of March 3, 1875, making Compton a party, directing that subpoena be served upon him in the District of Columbia, and requiring him to appear and set up his lien. After Compton's objections to the jurisdiction had been overruled, he answered, setting up the judgment of the Ohio State Court.

The U. S. Circuit Court decreed that he had a lien by virtue of the decision of the State Court, but made it subordinate to the four divisional mortgages on the System. A decree was made, directing sale under the foreclosure, but saving the rights of Compton.

An appeal was taken to the U. S. Circuit Court of Appeals of the Sixth Circuit. The main opinion, by Judge Taft, is exceedingly long, and is found in 68 Fed. 263. The first point to which we desire to call attention, is on the question of jurisdiction. Judge Taft says:

> "When the bill was filed in the court below, the property which it was thereby sought to

sell on foreclosure was in the possession of receivers appointed by that court in a previous litigation instituted to foreclose mortgages junior to the Knox and Jessup mortgage, and to sell the road to pay all junior liens and floating indebtedness. It is true, the litigation had proceeded to foreclosure sale and final decree; but for some reason, not plainly disclosed, the court refused to deliver possession to the purchasers, and retained it in the custody of the court for the purpose of protecting the interests of all the parties to the original litigation. Knox and Jesup wished to foreclose their mortgage, to marshal all liens, to sell the road at the highest price, to preserve the road and its income from waste by the appointment of a receiver. It is manifest that no other court than that in which the receivers then in possession had been appointed *could grant such relief.* Whether other courts could decree foreclosure and marshal liens, or not, certainly no other court could take possession of and sell the road, *and deliver an unclouded title to a purchaser.* If Knox and Jesup could not file their bill in the court below, then the act of that court in maintaining possession of the mortgaged property through its receivers would result in great injustice to them, and would constitute an abuse of its process. To prevent this, the court below had inherent ancillary jurisdiction, pending its possession of the railroad to hear and determine all petitions for relief presented to it in respect

of the possession and control of the road. It is of no importance that the custody of the railroad was likely soon to be changed from the court to the intending purchaser under the previous foreclosure proceedings, at which time any tribunal of competent jurisdiction could give all the relief prayed by Knox and Jesup. Their mortgage was then due. They were not obliged to await the uncertain delays of other litigation before taking steps to assert their rights. They therefore properly appealed to the court below, as the only tribunal which could do so, to give them adequate relief at once; and this was properly accorded to them, without regard to the citizenship of the parties to their bill. The foregoing reasoning is fully supported by many decisions of the Supreme Court. Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and coordinate jurisdiction, should not be permitted either to oust the possession of the first court, or *in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked.* This principle has been laid down by the Supreme Court of the United States in a long line of cases. *Hagan* vs. *Lucas,* 10 Pet. 400; *Williams* vs. *Benedict,* 8 How. 107; *Wiswall* vs. *Sampson,* 14 How. 52; *Peale* vs. *Phipps,* Id. 368; *Bank* vs. *Horn,* 17 How. 151; *Pulliam*

vs. *Osborn,* Id. 471; *Freeman* vs. *Howe,* 24 How. 450; *Youley* vs. *Lavender,* 21 Wall. 276; *Bank* vs. *Calhoun,* 102 U. S. 256; *Barton* vs. *Barbour,* 104 U. S. 126; *Krippendorf* vs. *Hyde,* 110 U. S. 276, 4 Sup. Ct. 27; *Covell* vs. *Heyman,* 111 U. S. 176, 4 Supt. Ct. 355; *Heidritter* vs. *Oilcloth Co.,* 112 U. S. 294, 5 Sup. Ct. 135; *Gumbel* vs. *Pitkin,* 124 U. S. 131, 8 Sup. Ct. 379; *Railroad Co.* vs. *Gomila,* 132 U. S. 478, 10 Sup. Ct. 155; In re Tyler, 149 U. S. 181, 13 Sup. Ct. 785; *Porter* vs. *Sabin,* 149 U. S. 473, 13 Sup. Ct. 1008; *Byers* vs. *McAuley,* 149 U. S., 608, 13 Sup. Ct. Rep. 906. Again every court has inherent equitable power to prevent its own process from working injustice to any one, and may entertain a petition by the aggrieved person, *either in the form of a simple motion,* or by intervention *pro interesse suo* in the cause in which the process issued, or by ancillary or dependent bill in equity, and may afford such relief as right and justice require. The existence of such a power, independent of statutory jurisdiction, is recognized by the Supreme Court in *Freeman* vs. *Howe,* 24 How. 250; *Minnesota Co.* vs. *St. Paul Co.,* 2 Wall. 609-633; *Railroad Co.* vs. *Chamberlain,* 6 Wall. 748; *Krippendorf* vs. *Hyde,* 110 U. S. 276, 4 Sup. Ct. Rep. 27; *Pacific R. Co. of Missouri* vs. *Missouri Pac. Ry. Co.,* 111 U. S. 505, 4 Sup. Ct. 583; *Stewart* vs. *Dunham,* 115 U. S. 61, 5 Sup. Ct. 1163; *Phelps* vs. *Oaks,* 117 U. S. 236, 6 Sup. Ct. 714; *Dewey* vs. *Coal Co.,* 123 U. S. 329; 8 Sup. Ct. 148; *Gumbel* vs. *Pit-*

kin, 124 U. S. 131, 8 Sup. Ct. 379; *Johnson* vs. *Christian,* 125 U. S. 642-646, 8 Sup. Ct. 989, 1135; *Morgan L. & T. Railroad & Steamship Co.* vs. *Texas Cent. Ry. Co.,* 137 U. S. 171, 11 Sup. Ct. 61.

Now, it frequently happens that under the process of the federal courts, exercising the original and lawful jurisdiction conferred expressly by the federal constitution and statutes, possession is taken and control exercised over property in which persons not indispensable parties to the suit have an interest, *by lien, mortgage, and in other ways.* In such cases there often is no diversity of citizenship between such persons and the plaintiff or defendant to the suit which would warrant the federal court in hearing an independent suit between them. But it may be essential, to preserve intact their rights in the property that such third persons should be permitted, at once, to have specific relief, which can only *be granted by a court having possession and control of the property.* And yet, in accordance with the principle already stated, no court but the federal court can exercise possession and control over the property in its custody. Of necessity, therefore, the federal courts exercise an ancillary jurisdiction in such cases; and third persons are permitted to come into the federal court, and set up their interest in the property, and secure the same full and adequate protection and relief to which they would be entitled in any court of competent

jurisdiction, were the property not impounded by the federal court."

In upholding the right of the Court to compel Compton to come in, the Judge says:

"We come now to the objection that, even if the jurisdiction of the bill be conceded, the court had no power to bring Compton before it. The argument is that the right of the federal court to grant relief to persons claiming an interest in property in its custody, without regard to their citizenship, is founded on its duty to prevent an abuse of its process to the prejudice of strangers to the suit, and is dependent on the wish of such strangers to secure that relief, expressed in an affirmative and voluntary appeal for the aid of the court, and that no power exists in the court to compel such a stranger to come into court against his will, simply because he claims an interest in the property impounded, if his citizenship would prevent the issue of such process against him in the original suit. Let it be conceded, for the purpose of argument, that the distinction made is a sound one. It does not help Compton. He was not brought into court to prevent prejudice to him by the federal court's possession of the *res*. He was brought into court to prevent prejudice to Knox and Jesup, who, otherwise having no right to invoke the action of the federal court, did so on the ground that its possession of the *res* prevented their getting full and adequate relief in

the state tribunals, and who were therefore entitled to bring into the case every one whose presence as a party was necessary to give them such relief. They had the right to have the railroad sold free from all liens, so that the purchaser should have an unclouded title, *and this could not be done without Compton's presence.* Compton was not a resident of the district in which the court's ordinary process ran, and he could not be brought in by subpoena. Knox and Jesup's bill was, however, a proceeding against property in the jurisdiction of the court. It was competent for congress, in such a case, to provide for constructive service, which would bind the person against whom it issued to the extent only of the res which lay within the territorial jurisdiction of the court.

Pennoyer vs. *Neff,* 95 U. S. 714;
Heidritter vs. *Oilcloth Co.,* 112 U. S. 294, 300, 301, 5 Sup. Ct. 135.

Statutory provision of this kind is found in Section 8 of the act of March 3, 1875 (18 Stat. 470), which was not repealed by the jurisdiction act of March 3, 1887 (24 Stat. 552), or of August 13, 1888 (25 Stat. 433) and is still in force. It provides:

'That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or *to* remove any incumbranoe or lien or cloud upon

the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if said absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and

under the jurisdiction of the court therein, within such district.'

The meaning of this statute is not doubtful. It applies to every suit of the kind mentioned in the section provided, only, the circuit court of the United States in which the proceeding is taken has otherwise jurisdiction of it. Whether it be a suit arising under the laws and constitution of the United States, or a suit to which the United States is a party, or a suit in which there is a controversy between citizens of different states, or a suit like the one at bar, of which the circuit court has jurisdiction indispensable and ancillary to its original jurisdiction, if it also satisfies the description of the statute, the process therein provided is available. The case of *Brigham* vs. *Luddington,* 12 Blatchf. 237, Fed. Cas. No. 1,874, has nothing in it to conflict with this conclusion. In that case, Circuit Judge Woodruff refused to make an order for substituted process against the owner of the property, because he was a citizen of the same state as the complainant, and his presence as a party would oust the jurisdiction of the court. The bill was an original one, and the jurisdiction could only rest on diverse citizenship. In the suit at bar, Compton's presence as party defendant would not oust the jurisdiction of the court, because as already shown, it is not dependent on diverse citizenship. The circuit court had jurisdiction of the cause otherwise than by virtue of the section above

quoted. The suit was brought to enforce a legal and equitable lien on real estate lying in the district, and to remove the cloud of Compton's lien from the title of the purchaser at the foreclosure sale. Compton was therefore properly brought into court by the substituted or constructive process provided in the section above quoted. *Farmers' Loan & Trust Co.* vs. *Houston & T. C. Ry. Co.,* 44 Fed. 115; *Greeley* vs. *Lowe,* 155 U. S. 58, 15 Sup. Ct. 24."

In holding that the Court has the power to compel a party to the action to convey property lying outside its territorial limits, it is said:

"That a court has the power, when it has personal jurisdiction over the mortgagor, to foreclose the mortgage on property lying outside of its territorial jurisdiction, is plain, and is fully established by the case of *Muller* vs. *Dows,* 94 U. S. 444, but it must exercise this power by a decree against the person compelling the mortgagor to convey the equity of redemption. Otherwise the decree is inoperative.

Carpenter vs. *Strange,* 141 U. S. 87, 106, 11 Sup. Ct. 960."

On the point that a junior incumbrancer is entitled to an accounting and credit for income during receivership, and after sale, it is said:

"It remains to inquire how the amount to be paid in redemption of the two divisional mortgages shall be estimated. Of course, the mort-

gagees are entitled to the principal of their mortgages, with interest to the time of tender; but the more doubtful question is whether the amount thus to be calculated must be reduced by the net earnings of the mortgaged property, i. e., the Ohio division, since the receivers turned over possession of the road to the purchaser. Compton secures his right to redemption through the original mortgagors. Whatever they would have had to pay to redeem the mortgages, he must pay,—no more, no less. It is the general rule that a mortgagee in possession, when his mortgage is redeemed, must account for the rents and profits during his tenancy. *Russell* vs. *Southard,* 12 How. 139, 155. The Wabash Railroad Company, as the successor in title of the purchasers at the sale, is to be regarded as the first Ohio mortgagee in possession, and therefore liable to account for the rents and profits or net earnings of the mortgaged property, in ascertaining the amount required to redeem the principal and interest of the mortgages. Our view of the saving clause in the decree for sale makes Compton's attitude with respect to the foreclosure sale quite like that of a junior incumbrancer with respect to a sale in a foreclosure proceeding brought by a senior mortgagee, to which the former was not a party. In such a case the weight of authority is that the purchaser is, with reference to the junior incumbrancer, the assignee of a mortgage in possession, and therefore liable to account for the rents

and profits. Jones Mortg. (5th Ed.), Sec. 1395; 2 Hill Morg. 158; *Vanderkamp* vs. *Skelton,* 11 Paige 28; *Walsh* vs. *Insurance Co.,* 13 Abb. Prac. 33; *Van Duyne* vs. *Shann,* 39 N. J. Eq. 6; *Bunce* vs. *West,* 62 Iowa 80, 17 N. W. 179; *Spurgin* vs. *Adamson,* 62 Iowa 661, 18 N. W. 293; *Ten Eyck* vs. *Casad,* 15 Iowa 524; *Murdock* vs. *Ford,* 17 Ind. 52. In two cases a different view has been taken. *Catterlin* vs. *Armstrong,* 79 Ind. 514; *Renard* vs. *Brown,* 7 Neb. 449; 2 Jones Morg. (5th Ed.), Sec. 1118 A.

The theory upon which the last-mentioned cases go, is that, by the defective sale, not only the mortgage passed to the purchaser by assignment, but also the equity of redemption, and the purchaser must be presumed to be holding the property as owner of the equity, rather than as mortgagee, and therefore not to be accountable for the rents and profits. If the purchaser becomes the possessor of the property by the payment of anything substantial over and above the foreclosed mortgage debt, the argument is a strong one that the rents and profits should be used to recompense him for such an outlay in securing the possession of the property. *Gray* vs. *Nelson,* 77 Iowa 63, 41 N. W. 566. But where, as in the case at bar, the purchase price is equal only to the amount due on the first two mortgages, it would not seem consistent with equity to permit such a purchaser to maintain, against a junior incumbrancer seeking to redeem, that he is receiving the rents and profits

as the owner of the equity, rather than as the owner of the mortgages which are galvanized into life to meet and defeat the otherwise good claim of the junior incumbrancer to a first lien. When the sale in this case took place, the mortgaged property was in the hands of receivers,—that is, the mortgagees were in possession—and the rents and profits were applicable to the mortgages in the order of their priority. *Howell* vs. *Ripley,* 10 Paige 43; *Miltenberger* vs. *Railway Co.,* 106 U. S. 286, 1 Sup. Ct. Rep. 140. If, as to Compton, the sale merely operated as an assignment of the various interests of the parties, the purchaser, as the assignee of the prior mortgages in possession, would seem to have derived his possession, and to maintain it, through the mortgagees, rather than from the owner of the equity of redemption. For these reasons, I think that Compton is entitled to an account of the net earnings of the Ohio Division of the Wabash Railroad Company over and above all operating expenses, including reasonable and necessary repairs, and that this sum should be deducted from the principal and interest due on the two mortgages. Of course, the railroad company is entitled to credit for all taxes paid by it, and for the cash advanced by it, in lieu of the bonds under the first mortgages, to pay receiver's obligations and other expenses properly chargeable as liens against the corpus of the road prior in right to the mortgages."

The Judges of the Circuit Court of Appeals were, however, unable to agree upon some of the questions presented, and accordingly certified it up to the Supreme Court. It was there held that Compton was entitled to a resale, and in determining the amount he should pay on the divisional mortgages, or the amount of the proceeds to which he was entitled, that an account should be had of the net earnings of the road.

Compton vs. *Jessup,* 167 U. S. 1.

Adelbert College of Western Reserve University was the owner of some of the same equipment bonds. It also brought an action, obtained judgment, and the judgment was affirmed by the Supreme Court of Ohio, in a memorandum decision.

Wabash Ry. Co. vs. *Adelbert College,* 78 N. E. 1141.

The Wabash took this judgment to the Supreme Court of the United States:

Wabash, etc., Co. vs. *Adelbert College,* 208 U. S. 37.

On the writ of error, the Supreme Court held that, although the actual property had passed from the receiver to a purchasing committee, yet the Circuit Court, *by reserving the power to adjudicate Compton's lien, still retained jurisdiction of the res,* and that no action, even by another person, involving the question so reserved, could be brought in any other court, and accordingly reversed the Supreme Court of Ohio.

The language is as follows:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbes the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto, and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, *or the control of the property.* In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of the diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the

others, but serve to prevent a conflict over the possession of property which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially, and with a spirit of respect for the just authority of the states of the Union.

Hagan vs. *Lucas,* 11 Pet. 400, 9 L. Ed. 470;

Williams vs. *Benedict,* 8 How. 107, 12 L. Ed. 1007;

Wiswall vs. *Sampson,* 14 How. 52, 14 L. Ed. 322;

Peale vs. *Phipps,* 14 How. 368, 14 L. Ed. 459;

Pulliam vs. *Osborne,* 17 How. 471, 15 L. Ed. 154;

Taylor vs. *Carryl,* 20 How. 583, 15 L. Ed. 1028;

Freeman vs. *Howe,* 24 How. 450, 16 L. Ed. 749;

Buck vs. *Colbath,* 3 Wall. 334, 18 L. Ed. 257;

Yonley vs. *Lavender,* 21 Wall. 276, 22 L. Ed. 536;

People's Bank vs. *Calhoun,* (*People's Bank* vs. *Winslow*) 102 U. S. 256, 26 L. Ed. 101;

Barton vs. *Barbour,* 104 U. S. 126, 26 L. Ed. 672;

Krippendorf vs. *Hyde,* 110 U. S. 276, 28 L. Ed. 145, 4 Sup. Ct. Rep. 27;

Pacific R. Co. vs. *Missouri P. R. Co.,* 11 U. S. 505, 28 L. Ed. 498, 4 Sup. Ct. Rep. 583;

Covell vs. *Heyman,* 111 U. S. 176, 28 L. Ed. 390, 4 Sup. Ct. Rep. 355;

Heidritter vs. *Elizabeth Oil Cloth Co.,* 112 U. S. 294; 28 L. Ed. 729, 5 Sup. Ct. Rep. 135;

Gumbel vs. *Pitkin,* 124 U. S. 131, 31 L. Ed. 374; 8 Sup. Ct. Rep. 379;

Johnson vs. *Christian,* 125 U. S. 642, 31 L. Ed. 820, 8 Sup. Ct. Rep. 989, 1135;

Morgan's L. & T. R. & S. S. Co. vs. *Texas C. R. Co.,* 137 U. S. 171, 34 L. Ed. 625, 11 Sup. Ct. Rep. 61;

Porter vs. *Sabin,* 149 U. S. 473, 37 L. Ed. 815, 13 Sup. Ct. Rep. 1008."

After all these years of litigation, the Wabash was finally reorganized, and certain of the bonds held by a committee, were exchanged for new bonds, and common and preferred stock. A suit was brought in the Supreme Court of the State of New York by a stockholder, alleging that this issue was *ultra vires* and void. It was removed to the Federal Court, but on appeal the United States Circuit Court of Appeals remanded the cause to the state court.

Pollitz vs. *Wabash R. Co.,* 176 Fed. 334.

Pending this litigation (in 1911) the road again went into the hands of a receiver. Judgment was secured in the lower court, declaring that the issue of bonds and stocks was illegal and void. Upon appeal to the Appellate Division, this judgment was modified, but the Directors were required to account to the Company in the sum of over $5,000,000.00. The last decision was April 15, 1915.

Pollitz vs. *Wabash R. Co.,* 152 N. Y. S. 803.

It is apparent, that much, if not all of this litigation, lasting over forty years, was due to the fact that different courts took jurisdiction of the same questions, and arrived at different conclusions.

Now, not only must the lien of Contract "B" be determined in this action, but also the *rank* of that lien. This leads us to an examination of the other documents, which the receivers have reported to this Court in their petition for six months' time. We find that the Wesern Pacific created a second mortgage, in the sum of $25,000,000.00, of which the Central Trust Company of New York is trustee. Under the agreement with the Denver, all of these second mortgage bonds were taken by that road. But we find in Subdivision 1, of Section 1 of Article Two, of this second mortgage, a provision that $10,863,000.00 par value of these second mortgage bonds were to be delivered to the Bankers' Trust Company, as security for the Denver's First and Refunding Mortgage, dated Aug. 1, 1908. The bankers who handled the finances of the First and Refund-

ing Mortgage, also made agreements, to which first the Bowling Green Trust Co., and later, the Equitable Trust Company, were parties, by which Western Pacific Second Mortgage Bonds were pledged under the First and Refunding Mortgage; and in countless ways, the fiscal operations, and the terms of the First and Refunding Mortgage import knowledge of the relations of the Denver and the Western Pacific.

Then, in 1912, the Denver created another mortgage of which the New York Trust Co. is trustee, known as the Adjustment Mortgage, which, by its very terms, recognizes the existence of the liability of the Denver to the bondholders of the Western Pacific.

It would seem clear then:

1. That this Court will order the Denver & Rio Grande, the Central Trust Co., the Bankers' Trust Co., and the New York Trust Co. to be made parties to this suit.

2. That this Court will then compel them to litigate the questions, (a), as to whether there is an equitable mortgage on the Denver for the benefit of the Western Pacific bondholders; (b), if so, the rank of that lien, as compared with the Denver's First and Refunding Mortgage, and its Adjustment Mortgage; and (c), whether or not the Denver has any further claim to or lien upon the Western Pacific after sale under foreclosure.

VIII.

Contract "B" is an entire contract, with correlative and mutually interdependent rights and duties, and no judgment could possibly be rendered fixing the Denver's liabilities, which does not at the same time determine its correlative rights.

Upon the oral argument, the Court asked the question: "Why was Contract 'B' ever made?" The answer is to be found in the history of the construction of the Western Pacific, particularly as shown in the various documents returned to the Court in the petition of the receivers, and used upon this hearing.

1. Contract "A", also pledged under the First Mortgage, provides that as long as any of the bonds are unpaid, the Denver shall have the right to use the line of the Western Pacific, as provided in Contract "B".

2. Contract "B" recites that upon the completion of the Western Pacific it would form a through line with the Denver, and that the Denver has no other outlet to the Pacific Coast not controlled by a competitor.

3. Contract "B" recites that *all* benefits to be derived from it are pledged under the First Mortgage.

4. The Denver agrees, as far as it lawfully may, to deliver to the Western Pacific all west-bound tonnage, and the Western Pacific agrees to deliver to the Denver, all east-bound freights.

5. The Western Pacific agrees to complete its line to Salt Lake City, with all reasonable diligence.

Now, aside from the strictly financial part of Contract "B", it is clear that it was executed by the Denver as a means of securing an outlet to the Pacific Coast, by the construction of a railroad from Salt Lake to San Francisco. In order to assure this, the Denver pledged its credit, in return for an agreement which made the Western Pacific to all intents and purposes, a part of the Denver. In other words, the *consideration* for the promise to pay interest and sinking fund, was the promise of the Western Pacific to deliver all traffic to the Denver.

But the plaintiff, conceding that so far as the traffic part of the contract is concerned, it must be interpreted and enforced in the present action, claims the right to enforce the reciprocal promise of the Denver in another forum. Here are mutually reciprocal covenants; in effect, the Denver says to the Western Pacific: "If you will give me all your traffic, I will guarantee the interest on your bonds"; the Western Pacific says to the Denver: "If you guartntee my interest, I will deliver you all my traffic."

The proposition of plaintiff is, that it can, and mlust, leave this Court to enforce the traffic part, but that it can go to New York and enforce the correlative obligation of the Denver there.

But the question as to whether or not the Denver has the right to compel the Western Pacific to live

up to the traffic and trackage arrangements, is of necessity and concededly a matter for this Court, inasmuch as it directly concerns the operation of the physical property. So, when this Court comes to frame its decree *nisi,* it will determine whether or not a purchaser shall take the property so tied to the Denver, or free from these obligations. It is true, that Contract "B" provides that the bondholders may compel its abrogation as to these features; it is true also, that it contains provisions that this abrogation shall not relieve the Denver from its obligation to pay interest and sinking fund. But the fact remains, that this Court must interpret those very provisions, and say, by its decree, how far, if at all, they can be made operative.

But, supposing the District Court in New York, in interpreting Contract "B", as prayed for in the Dependent Bill, should make and enter its decree to the effect that the Denver is bound to pay the interest and sinking fund, but only upon the condition (a) that the Western Pacific shall apply its earnings above operating expenses and taxes to that purpose, and, or (b), that the Western Pacific should continue to form a through line from Denver to San Francisco, and deliver all its freight to the Denver and Rio Grande.

Such a decree would be the clearest kind of an interference with the physical property actually in the possession of the receivers.

Such a judgment may not be probable. But it is not impossible that the New York Court might

say, that if Contract "B" is a guaranty at all, it is a continuing guaranty, and must be supported by a continuing consideration.

Cal. Civ. Code, Sec. 2815;

White Sewing Machine Co. vs. *Courtney*, 141 Cal. 676;

Pingrey on Suretyship, Sec. 346.

But whatever the outcome may be, it is certain that any decree fixing the Denver's liability, must also fix its correlative *rights,* and no decree can be possible concerning those rights, which will not have for its subject matter the railroad of the Western Pacific.

IX.

Both the deed of trust and Contract "B" give the Western Pacific the right to bring an action. That right, of course, passes to the receivers. The right of the trustee to bring the suit likewise passed to the receivers by the act of the trustee in filing the bill to foreclose, and in causing the appointment of the receivers.

Contract "B" contains the following provision:

> "The Trustee, as well as the Pacific Company, its successors and assigns, shall be entitled to specific performance of the same, and of any agreement substituted therefor, and to enforc the same and if any agreement substituted therefor by suits in equity and actions at law or otherwise, as may be appropriate."

(*Article VI, Section 14.*)

The Deed of Trust provides as follows:

"The railway company covenants and agrees that it will enforce by suit or suits in equity or at law, or by other proper proceedings, all the terms and provisions of any and all of the agreements described in paragraph sixth of the granting clauses hereof, and any and all traffic and trackage and other agreements pledged or deposited hereunder, or made with, or assigned to, the Trustee for the benefit or protection of the holders of the bonds secured hereby, and likewise of all modified agreements which may be substituted for any of said above-mentioned agreements, in accordance with the provisions hereof; and that it will perform any and every act, and observe any and every condition requisite to the maintenance of each and all said agreements in full force and virtue; provided, however, that the trustee shall from time to time, if requested by the holder of any bond secured hereby and satisfactorily indemnified against the expense of so doing, enforce in like manner any of the provisions of Article II of said above-mentioned agreement between the Denver and Rio Grande Railroad Company, the Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company that require any payments to be made to the Trustee by the parties of the first part to said agreement, and

that the Trustee may, in its discrètion, and, upon the request of the holders of twenty per cent, in amount of the bonds secured hereby at any time outstanding, being indemnified to its satisfaction against the expense of so doing, shall, in like manner, enforce all the terms and provisions of any and all such agreements, acting in each case either alone or with the Railway Company, and either in its own name or in the name of the Railway Company, or in name of both; and the expense of so doing shall, upon demand of the Trustee, be paid by the Railway Company, and in default of such payment, shall be a charge in favor of the Trustee upon all of the premises and property mortgaged or pledged hereunder prior to the lien of the bonds secured hereby."

These provisions clearly give to the Western Pacific the right to bring an action to force the Denver and Rio Grande to make the payments specified in Contract "B". And the order appointing the receivers directs them to bring such suits as may be necessary to protect the "property and trusts" given into their care. One of the trusts confided to them is to protect the rights of the bondholders in every possible way; and it would seem that it is as much their duty to see to it that the Denver and Rio Grande makes up the deficit, as to take care that by proper and economical management the property earns as large a sum as possible.

X.

The plaintiff has no interest in Contract "B", except that it is made trustee to hold that agreement along with the other assets pledged by the Western Pacific.

Broadly speaking, the First Mortgage Bonds are secured by five classes of collateral:

1. The physical properties.

2. The earnings of the Western Pacific.

3. Certain shares of the Capital Stock of subsidiary companies.

4. The right of the Western Pacific to a preference in traffic originating upon the Denver and the Missouri Pacific, and destined for this Coast.

5. The obligation of the Denver to make up deficiencies in sinking fund and interest.

All of these things make up a trust fund, held by the Equitable as security for the bondholders. Admittedly, the plaintiff has no *beneficial* interest in any part of this fund; admittedly, it has sought the aid of this Court in the administration of all the component parts of that fund except a part of the obligation of the D. & R. G. But, the so-called financial portion of Contract "B" was made with the Western Pacific, and the plaintiff is only a party to that contract in the same sense that it is a party to the First Mortgage,—that is to say,—it is a bare, naked trustee for the benefit of the bondholders.

Nor is it any answer to this plain proposition

to say that by the terms of Contract "B", the Equitable Trust Co. is given the power to enforce it. This provision, in the first place, adds nothing to it; for it is elementary that a trustee has the power to collect assets, irrespective of specific provisions to that effect. But, here again, Contract "B" does not differ from the rest of the First Mortgage. The latter instrument, by its specific terms, confers upon the trustee the power to enforce its provisions as to *all* the pledged property. It provides, for instance, that in the event of a default, the trustee can enter upon the property of the Western Pacific, and run the road for the benefit of the bondholders. But it has not chosen to do so; under direction of the requisite proportion of the bondholders, it was brought the property into this Court for orderly administration; and to say that this Court should, having assumed the responsibility of the whole, proceed to administer only a part, where all the parts are so closely entwined, is to state a proposition which refutes itself.

After all, Contract "B" is the contract of the Western Pacific. In its every aspect, it was made for the benefit of that corporation, and not the Trust Company. Its purpose was to enable the Western Pacific to sell *its* bonds; in the traffic arrangements, its purpose is to enable the Western Pacific to do a large business by virtue of the connections at Salt Lake with Eastern, Southern and Mid-Western territory; in the fiscal aspect of the contract the covenant is to pay the interest of

the Western Pacific. It is, therefore, the property of the Western Pacific in every possible sense, and being so, it passed, with the act of the plaintiff in filing the Bill to foreclose, into the hands of the receivers, to be there dealt with as this Court may direct.

XI.

The suit in New York may be an interference with a question necessarily determinable in this Court, to wit: The disposition of preferential claims.

The affidavits used on this hearing show that there are a large number of claims, accruing prior to the receivership which, on their face at least, seem to be preferential in charcater. These claims, aside from those of the Denver & Rio Grande, scarcely aggregate $200,000.00; and if the claims of that corporation do not share, there will be sufficient diverted money to pay them in full, under the doctrine of the Ocean Shore case.

But the Denver & Rio Grande, aside from its claims upon the notes, and for interest on the Second Mortgage Bonds, has presented claims of over a million dollars, of which about one-half are clearly for operating expense. Furthermore, the Utah Fuel Company has filed here a petition in intervention claiming the sum of $1,750,000.00 as entitled to share in the preferential funds. But under the terms of Contract "B", the Denver agrees to make up all deficiencies in operating expenses, and to pay the difference between net earnings and

interest and sinking funds. So, it may well be argued, that the Denver, being bound to make up operating expenses, cannot establish its claim, insofar, at least, as that claim is for operating expense. So, too, the claim of the Utah Fuel Co. is for money advanced, really to make up interest payments on the bonds, which the Denver, under Contract "B", had agreed to pay.

Now, no one would deny that the question of the adjustment and payment of preferential claims is a matter for this Court. But the relation of the Denver, and its obligation under Contract "B" is necessarily involved—in that the Court cannot say whether it is entitled to share in preferential funds without construing that contract.

XII.

The first mortgage does not by any means provide that Contract "B" shall not be subject to the control of the Court during forecloserue; it only attempts to prescribe its custody after foreclosure.

The provision of the First Mortgage upon which the plaintiff mainly relies is found in Section 9 of Article Five. It reads as follows:

> "*Section 9.* Upon the completion of any sale or sales the Trustee shall execute and deliver to the accepted purchaser or purchasers a deed or deeds of transfer and release of the premises and property sold, or shall execute and deliver in conjunction with the deed or deeds of the person or officer, conducting such

a sale or proper release of such premises and property, and the Trustee shall deliver to such purchaser or purchasers all bonds, obligations and the certificates of all shares of stock, agreements and contracts, held by it and sold to such purchaser or purchasers, together with proper assignments and transfers of such bonds, obligations and shares, agreements and contracts; Provided, however, that so long as the Denver and Rio Grande Railroad Company and the Rio Grande Western Railway Company, or either of them, shall, by the terms of their said agreement with the Railway Company and the Trustee, be under obligation to make any payment or payments to the Trustee either for the purpose of providing funds wherewith to make payments of interest upon the bonds secured hereby or wherewith to make any payment into the sinking fund hereby provided for, the Trustee shall not deliver said last-mentioned agreement to any such purchaser or purchasers, although such purchaser or purchasers may have succeeded to any or all of the interest and rights of the Railway Company thereunder. The Trustee and its successor or successors are hereby appointed the true and lawful attorney or attorneys irrevocable of the Railway Company, in its name and stead, to make all necessay deeds of conveyance, sale and transfer of the premises and property hereby conveyed, mortgaged or pledged, and for that purpos may execute all necessary acts of con-

veyance, assignment and transfer, and may substitute one or more persons with like power, the Railway Company hereby ratifying and confirming all that its said attorney or attorneys, or such substitute or substitutes, shall lawfully do by virtue hereof. Any such sale or sales made under or by virtue of this indenture, either under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, shall divest all right, title, interest, estate, claim and demand whatsoever, either at law or in equity, of the Railway Company, or, in and to the premises and property sold, and shall be a perpetual bar both at law and in equity against the Railway Company, its successors and assigns, and against any and all persons claiming or to claim the premises and property sold or any part thereof, from, through or under the Railway Company, its successos or assigns. Nevertheless, the Railway Company shall, if so requested by the Trustee, ratify and confirm such sale by executing and delivering to the Trustee or to such purchaser or purchasers, all proper deeds, conveyances and releases as may be designated in such request.

The receipt of the Trustee or of the person or officer conducting any such sale shall be a sufficient discharge for the purchase-money to any purchaser of the property, or any part thereof, sold, as aforesaid, and no such pur-

> chaser, nor his representatives, grantees or assigns, after paying such purchase-money and receiving such receipt, shall be bound to see to the application of such purchase-money upon or for any trust or purpose of this indenture, or be answerable in any manner whatsoever for any loss, misapplication or non-application of any such purchase-money or any part thereof."

It will be noted that this provision does not attempt to prescribe what shall be done with Contract "B" during foreclosure, nor prior thereto. Nor does it attempt, in any manner to limit the Court's power to enforce it as to any liability which may have accrued prior to an actual sale. The liability which accrued before this suit was started, and pending the receivership, is left in exactly the same position as any other asset. Nor does this provision in any way seek to take away from the Court, in an action to foreclose, the right and duty to construe Contract "B", nor to enter a decree declaring to what extent it will enure to the benefit of the Western Pacific and its bondholders, and to what extent it will bind the property of the Denver, after the sale takes place. All this provision purports to do, is to provide for the mere naked custody of the instrument after the sale. In other words, it contemplates that the property may be sold for less than the principal nad interest of the bonds; in that event, it is probable that the liability of the Denver will survive as to the deficiency; and the provision in

question merely leaves the machinery of the actual collection of the semi-annual interest and sinking fund upon that deficiency in the hands of the trustee.

XIII.

The first mortgage itself, and the endorsement prescribed by that instrument, interpret Contract "B" to mean that the Denver has agreed to pay, not the interest and sinking fund absolutely, but only the difference between the earnings of the Western Pacific and the interest and sinking fund.

If, taking Contract "B" as a whole, it can be reasonably contended that there is any ambiguity, that ambiguity is removed by the interpretation placed upon the instrument by the First Mortgage itself. In prescribing the form of the bonds, the First Mortgage provides that each bond shall have endorsed upon it the following memorandum:

> "The issue of bonds of which the within bond is one, is further secured by certain traffic and other contracts described in the mortgage within mentioned, being respectively:
>
> (a) Traffic contract between the Missouri Pacific Railway Company and the Denver and Rio Grande Railroad Company;
>
> (b) Contract for completion of the Western Pacific main line from San Francisco to Salt Lake City, between the Rio Grande Western Railway Company, the Western Pacific Railway Company and the Trustee of said mortgage;

(c) Contract between the Denver and Rio Grande Railroad Company and the Rio Grande Western Railway Company, the Western Pacific Railway Company and the Trustee of said mortgage, which contract among other things binds the Rio Grande Western Railway Company and the Denver and Rio Grande Railroad Company, jointly and severally to pay semi-annually to the Trustee of said mortgage such sums of money as may be necessary, *in addition to the earnings of the Western Pacific Railway Company and other moneys actually and lawfully appropriated by it for the purpose,* to meet the interest and sinking fund payments upon said issue bonds and to pay any taxes which the Western Pacific Railway Company may be required or permitted to pay thereon or deduct therefrom, except such taxes as said mortgage requires the Western Pacific Railway Company itself to pay."

And the granting part of the First Mortgage, by apt words, conveys to the Trustee, in trust to secure the bonds, various properties, including Contract "B", which is thus described:

"An agreement with the Denver and Rio Grande Railroad Company, the Rio Grande Western Railway Company and the Trustee hereunder, whereby said three railroad companies agree, among other things, to maintain a joint transportation system, and whereby the Denver and Rio Grande Railroad Company

and the Rio Grande Western Railway Company also jointly and severally agree, so long as any of the bonds secured hereby shall remain unpaid, principal or interest, to purchase unsecured obligations of the Railway Company to such amounts as will yield moneys sufficient, *after application of the proper, available income of the Railway Company and other moneys appropriated by it for the purpose,* to provide for the payment of the Railway Company's operating and maintenance expenses, taxes, the interest upon the bonds secured hereby, the annual payment to be made into the sinking fund provided for hereby, any other expense that may be necessary to assure the continued operation of the Railway Company's property and the unimpaired lien and priority of this indenture, any taxes that the Railway Company may be required by law or permitted to pay upon or deduct from the principal or interest of the bonds secured hereby and all interest upon indebtedness of the Railway Company other than said bonds, and to pay the purchase price of said obligations, so far as such payments shall be necessary to provide for the payment of the interest upon the bonds secured hereby and the payments to be made into the sinking fund for the redemption of said bonds to the Trustee, at such times and in such manner as to make the same available for the payments to be made therewith as aforesaid.

XIV.

Both the first mortgage and Contract "B" provide that a suit for the enforcement of the latter may be brought either by the trustee or the Western Pacific, or both together. If any suit is necessary at all, still, the action in New York cannot be maintained, for two reasons:

(1) Such a suit must be brought in the Court of Primary Jurisdiction;

(2) The question as to whether such a suit should be brought had been already submitted to this Court by the receivers.

We have already given our reasons why it seems to us that a separate action to establish rights and liabilities under Contract "B" is unnecessary. But even if it should be determined that such a suit is necessary or advisable, then two questions at once arise: (1) Where should this suit be brought; and (2), Who should bring it?

1. In the first place, as a matter of common sense and convenience, it would seem clear that an action which involves an accounting of property in the possession of this Court, is properly maintainable here and not elsewhere. And we think that if there ever was any doubt upon this subject, none has existed since *Central Trust Co.* vs. *East Tennessee, etc. R. R.,* 30 Fed. 896. In that case, an attempt was made in the Court of ancillary jurisdiction to establish a preferential claim, involving a general accounting. The Court says:

"The court having control of the main suit has, of course, direct control of the receiver appointed in the case, of all moneys coming to his hands, of the distribution of the same, and of the distribution of all funds derived from the sale of property sold under decrees in the cause.

It follows that if any account is to be taken of the funds that came to the receiver's hands, and of the earnings of the railway property while in the receiver's hands, and of the disposition made of all funds, in order to determine the existence of a priority of any lien, such account should be taken in the main cause, and cannot be taken in an ancillary suit, where the court has no possession of the fund. For instance, on this hearing, it is admitted that $75,000 came into the hands of the receiver on his taking possession of the railway property, and that the same were earnings of the property prior to the receivership. This fund was confessedly subject to the liens for labor and supplies by which it was earned, and has been largely, if not entirely, so applied by the court in the main cause. Now, if any one has a lien on such fund, or on the property of the company by reason of such fund, say for a judgment recovered against the company prior to the receivership, an accounting and marshaling of liens must be had, and such accounting and marshaling can only be had in one court,

or inextricable confusion would result. So far, therefore, as petitioner's right to be paid depends upon any equity resulting from the receivership, or the management and disbursement of funds coming to the hands of the receiver, we can give him no relief, and can only refer him to the consideration of the circuit court at Knoxville."

Again, in *Clyde* vs. *Richmond etc. Co.,* 56 Fed. 542, it is said:

"This is a claim against the receivers, which can have no standing except this. The materials were furnished to one of the railroads operated under the Richmond & Danville system, and to that extent assisted in keeping the whole system a going concern. A certain amount of income was made in the operations of this system, which came into the hands of these receivers. The materials supplied by the petitioner directly or indirectly contributed to this income. The petitioner asks that she be paid out of this. It would seem that the only forum in which this claim can be decided is that in which the original proceedings under which the receivers were appointed were had. This is the circuit court of the United States for the eastern district of Virginia. *Central Trust Co.* vs. *East Tennessee, V. & G. R. Co.,* 30 Fed. Rep. 896. In that court an order was entered 28th June, 1892, calling upon all claimants of the rank of this petitioner to prove their claims before

special masters in Richmond, Va., by a day certain. This order was duly published in Columbia, in South Carolina. The time, it is true, has elapsed; but under well-known practice in equity permission may be given now to intervene if the fund is not distributed. At all events, as the receivers file their accounts in Virginia, and not in this district, the court there alone knows the condition of the estate, and for this reason application should be made there. *Jennings* vs. *Railroad Co., supra.* The petition will not be dismissed. Let it be retained, in order, if possible, to assist the petitioner in obtaining payments of her claim, which is so manifestly just."

Later, in *Finance Co.* vs. *Charleston, etc. R. R.,* 61 Fed. 369, Judge Simonton speaks of the practice as being "now fixed".

2. At the time this suit was brought in New York, there was pending and undetermined in this Court a petition of the receivers; that petition reported *in haec verba,* all or nearly all of the various instruments by which the Western Pacific and the Denver & Rio Grande are bound up together, including of course, the First Mortgage and Contract "B". This petition alleged that these relations involved so many complicated questions of law and fact, that the receivers did not feel justified in recommending any immediate action; they therefore requested six months' time to further investigate and report.

This petition, then, in legal intent, presented squarely the proposition as to whether any action should be immediately taken with reference to the Denver, or whether the receivers should be allowed ample time, that they might be sure and safe. But, after the plaintiff had notice of this petition, and before the day arrived on which it had been set for hearing, the suit in New York was commenced.

This, then, was the situation: Contract "B", by its terms, lays upon the Western Pacific the duty of its enforcement; the First Mortgage does the same thing; both instruments, however, confer upon the trustee the power of enforcement; that trustee, by its bill in equity, sets in motion the machinery of this Court, and as a result receivers are appointed; they request of the Court time to investigate before anything is done with reference to the Denver; before this Court can pass upon that request, the plaintiff elects to decide that petition for us, and files the suit in New York.

In *Gooding* vs. *Reid, Murdock & Co.,* 177 Fed. 678, the Court of Appeals of the Seventh Circuit says:

> "Had the equity court, in pursuance of its power to issue the writ, power to enter the order appealed from, restraining the law court from proceeding with the action at law? The question, as we have already said, is not, Shall a 'Federal Court' restrain the 'State Court', but shall a court of equity restrain a court of law in taking jurisdiction in a complaint, by

a party to the equity suit, that one of the processes of the court of equity, issued against him, was wrongfully issued, and undertaking to redress that wrong? The question has been up in England in *Aston* vs. *Heron,* 2 My. & K. 390, 39 Eng. Reprint, 393, and in *Frowd* vs. *Lawrence,* 1 Jac. & W. 656. In the first of these cases, Lord Brougham, Lord Chancellor presiding, speaking to the question above stated, says:

'The court excludes all other jurisdiction in everything relating to its process, not only preventing any other court from judging whether or not its orders were regular, but from examining into the regularity of their execution; and not only preventing such examination, but shutting out redress at any hands but its own, where a wrongful act is admitted to have been done under color of obeying its commands. It assumes to be the only judge of all that regards the issuing and the execution of its own orders. Whether or not it be necessary that the court should enjoy this jurisdiction, and have the power of enforcing it, exclusive of all interference, even where its orders cannot be said to have been obeyed, but rather have been colorably used as a pretext for wrong doing, it is now too late to inquire. The question has been settled long ago.'

And in the second of these cases, speaking to the same question, Eldon, Lord Chancellor, says:

'In this case an attachment, under which the defendant was taken up, issued regularly, and, upon his application it was afterwards discharged, with costs. No application was made to this court, to visit the proceeding upon the parties concerned; but the defendant, after the attachment is discharged, brings an action at law for damages, and a motion is now made to me for an injunction to restrain him, *brevi manu,* from going on with it. I need not point out the importance of the question, because it is one between this court and the right of the subject to ask of a jury, whether he is not entitled to damages for being deprived of his liberty. It was stated that there was a case in Vernon, in which it had been expressly laid down that the court would not permit such an action to go on. That was a very strong case. The ground there taken was, that the court would not suffer its process to be examined by any other court; and that a court of law could know nothing of it.'

* * * * * * *

'But this does not mean, that the persons concerned will not be obligated to make the party satisfaction; only that it must not be done by an action at law. It is impossible, from the nature of the thing, that they can try the regularity of an attachment in a court of law. The injunction must be, without prejudice to any application that the defendant may be ad-

vised to make for compensation, or the costs at law.'

The reference of Lord Brougham, to the question as one settled 'long ago', and now 'too late' to inquire into, is a reference probably, at least in its origin, to the celebrated contest between Lord Chief Justice Coke and Lord Chancellor Ellesmere, in the time of James I, as to whether a court of equity could restrain a judgment at law in which, as stated in Vol. 1, p. 5, Ames' Selection of Cases in Equity Jurisdiction, foot note, 'Lord Ellesmere's triumph was complete!'

In this country, in *Mackay* vs. *Blackett,* 9 Paige, Ch. (N. Y.) 437, Walworth, Chancellor, speaks as follows:

'It (the court), must restrain of course; otherwise it permits its own orders to be rescinded and its jurisdiction to be questioned—its orders to be rescinded indirectly and not by the Superior Court of Appeal; its jurisdiction to be questioned by courts of inferior or co-ordinate authority.'

Also *Reynolds* vs. *Corp.,* 3 Caines (N. Y.) 268, (Chief Justice Kent).

And in Foster's Federal Practice (Third Edition), Vol. 1, Sec. 263, treating specifically of the practice in obtaining the writ of *ne exeat,* the author concludes:

'The discharging order usually enjoins the defendant from bringing an action of false imprisonment (citing *Darley* vs. *Nicholson,* 2 Dr. & War. 86); and the prosecution of such an action may be restrained by a subsequent order (same citation).'

This is sufficient authority, it seems to us, to settle the question in favor of the court of equity's right to enjoin. Upon principle the right ought to exist. It does not deny to the person against whom the process has been issued, his right to redress; for, contrary to the wrong sued upon in the ordinary action for false imprisonment, the party has redress in the court that issues the process. There is no need, therefore, that he have the right to bring an action for false imprisonment. On the other hand, the need is imperative that a court of equity, issuing process in furtherance of its purposes, and within its jurisdiction, shall not be hampered by collateral inquiry, in other courts, as to the legality of such process, or the sufficiency of the grounds upon which it was issued. For conflicts of that kind, proceeding with varying fortunes in the different courts, besides weighing litigation with additional expense, can result only in making those things uncertain that ought, at every stage of the proceeding, to be capable of being reduced to certainty. Equity courts, subject to such procedure, would no longer be the masters of their writs."

The plaintiff could have come into this case, and presented any reasons it may have had, why the receivers should not be given the time they asked, or why proceedings against the Denver should be taken at a stated time, or in a certain manner. But it certainly could not constitute itself the sole judge, and proceed to put in litigation in a foreign jurisdiction, the very matters which the receivers had presented to this Court as worthy of more mature examination, and more deliberate judgment.

In this Circuit, the principle that a Court of Equity will enjoin a party from proceeding to try the question in a foreign jurisdiction, has been several times affirmed. For instance, in *Gage* vs. *Riverside Trust Co.,* 86 Fed. 984, Judge Ross enjoined the defendant from further prosecuting an action in England, saying:

> 'It is not important that the shares of stock, and the written contract by which the complainant mortgaged or pledged them, together with his rights and interests in and under the contract of December 13, 1889, to the Investment Company, are, and ever since the execution of the mortgage have been situated in California, and within the jurisdiction of this court. Besides:
>
> 'Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel

the defendant to do all things necessary, according to the *lex loci rei sitae,* which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam.' Phelps* vs. *McDonald,* 99 U. S. 298, 308; *Cole* vs. *Cunningham,* 133 U. S. 119, 10 Sup. Ct. 269.

The suggestion that the granting of the injunction asked for may enable the statute of limitations to run against the Investment Company's rights under the mortgage is without force, for several reasons. In the first place, it is not now sought to compel the defendant Investment Company to dismiss its suit in the high court of justice of England, but only to enjoin it from prosecuting that suit during the pendency of this prior suit. In the second place, as it is a fact conceded by the pleadings on all sides that the pledged or mortgaged property is held by the Investment Company as security for money loaned by it to the complainant, that company could not be compelled to surrender the security without full payment of its debt, even though the statute of limitations had fully run in the complainant's favor. *Whitemore* vs. *Savings Union,* 50 Cal. 150; *Grant* vs. *Burr,* 54 Cal. 300; *Spect.* vs. *Spect.,*

88 Cal. 437, 26 Pac. 203. In the third place, the complainant would be estopped by the allegations and prayer of his bill of complaint from setting up the statute of limitations in bar of his admitted and alleged indebtedness. *Railroad Co.* vs. *Howard,* 13 How. 335, 336; *Bowen* vs. *Stribling* (S. C.) 24 S. E. 986; 2 Herm. Estop & Res Adj. 912. The power of a court of chancery, in a proper case, to restrain persons within its jurisdiction from prosecuting suits in other courts, foreign or domestic, is well settled. In *Lord Portarlington* vs. *Soulby,* 3 Myln & K. 104, 106, Lord Chancellor Brougham reviews the history of the jurisdiction to restrain parties from commencing or prosecuting actions in foreign countries, and concludes:

'Nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court.' *Earl of Oxford Case,* 1 Ch. R. 1, 2 White & T. Lead. Cas. Eq. 316.

Mr. Justice Story states the principle thus:

'But, although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore,

both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them, by injunction, to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam.* * * * It is now held, that, whenever the parties are resident within a country, the courts of that country has full authority to act upon them personally, with respect to the subject of suits in a foreign country, as the ends of justice may require, and, with that view, to order them to take, or omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country.' Story, Eq. Jur., Secs. 899, 900.

See also, *Dehon* vs. *Foster,* 4 Allen 550; *Massie* vs. *Watts,* 6 Cranch 158; *Cole* vs. *Cunningham,* 133 U. S. 118, 10 Sup. Ct. 269; *Phelps* vs. *McDonald,* 99 U. S. 298; Beach, Mod. Eq. Prac., Secs. 763, 764.

The proposition that the court which first acquires jurisdiction of a cause and of the

parties thereto will hold and maintain it, in order to settle and end the controversy, does not admit of question. From the views expressed, it results that the injunction asked for should be granted, and it is so ordered."

XV.

Where a Court has acquired jurisdiction of a controversy it will enjoin any party from litigating any phase of that controversy in another jurisdiction.

In *Moran* vs. *Sturges,* 154 U. S. 256, the Supreme Court sums up the result of the authorities as follows:

> "It will be perceived that the principle invoked in such cases as *Gaylord* vs. *Fort Wayne, M. & C. R. Co., Home Ins. Co.* vs. *Howell, supra,* is, that courts, for the purpose of protecting their jurisdiction over persons and subject matter may enjoin parties who are amenable to their process and subject to their jurisdiction from interference with them in respect of property in their possession *or identical controversies therein pending,* by subsequent proceedings as to the same parties and subject-matter in other courts of concurrent jurisdiction."

In *Ex parte Young,* 209 U. S. 123, the Supreme Court held that the Federal Courts will enjoin prosecutions in State Courts, where the question of the validity of the statute is already pending in the Courts of the United States.

In *Sharp* vs. *Bonham,* 213 Fed. 660, Judge Sanford reviews the authorities as follows:

> "Under these circumstances the controlling question presented is whether or not the proceedings in this court prior to the institution of the suit in the Chancery Court were such as to vest in this court exclusive jurisdiction of the subject-matter of the litigation so as to deprive the state courts of any jurisdiction in regard thereto, pending the final termination of the suit in this court.
>
> It is clear on the one hand, as a rule of substantive law, applicable as between the Federal and State courts, that the court which first acquires jurisdiction over property in controversy or the *res* which constitutes the subject matter of the suit, is entitled to retain that jurisdiction to the end of the litigation without interference from any other court whatever. 3 Street Fed. Eq. Pract., Sec. 2529, p. 1466, and cases cited in note 41. And this is more than a mere rule of comity as between the State and Federal courts; it is a 'principle of right and law', which so operates that when one court takes a specific thing into its jurisdiction that *res* is as much withdrawn from the judicial power of any other court as if it had been carried physically into a different territorial sovereignty. *Covell* vs. *Heyman,* 111 U. S. 176, 182, 4 Sup. Ct. 355, 28 L. Ed. 390.
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> It is equally clear, on the other hand, that the

mere fact of the pendency of two suits *in personam* between the same parties, upon the same identical cause of action, in courts of different jurisdictions, does not make a case in which the jurisdiction of one court is interfered with or impeded by the action of the other. *Stanton* vs. *Embry,* 93 U. S. 548, 23 L. Ed. 983; *Gordon* vs. *Gilfoil,* 99 U. S. 168, 178, 25 L. Ed. 383; *Hubinger* vs. *Trust Co.* (8th Cir.) 94 Fed. 788, 36 C. C. A. 494; *Powers* vs. *Building & Loan Assoc.* (C. C.), 86 Fed. 705, 708; 1 Fost. Fed. Pract. (4th Ed.) 506. In such case the pendency of the former suit *in personam* is not a matter going to the jurisdiction or ground for the abatement of the second suit, although as a rule of comity between the courts of the second court will ordinarily upon proper motion stay its proceedings until the termination of the litigation in the former court. Simk. Fed. Suit Eq. (2d Ed.) 410. But in such case if such stay is not had, and if final judgment be rendered first in the court in which the proceedings were later instituted, such judgment will thereafter be binding as *res judicata* between the parties in the court in which the proceedings were first instituted. *Merritt* vs. *Steel Barge Co.* (8th Cir.), 79 Fed. 228, 24 C. C. A. 530. And see *Gates* vs. *Bucki* (8th Cir.), 53 Fed. 961, 965, 4 C. C. A. 116.

The precise question for determination in the present case then is whether this suit, which was brought to declare and enforce a

trust upon which the church property was held, and in which the trustees holding title to the property were made party defendants and brought before the court, is to be deemed as falling within the rule applicable to suits where the *res* is in the actual possession of the court, on the one side, in which case its jurisdiction remained exclusive until the determination of the litigation, or whether, on the other hand, it is to be deemed analogous to a mere suit *in personam,* in which this court had not exclusive jurisdiction and in which the prior judgment in the State courts should be held conclusive as to the rights of the present litigants through their proper class representation in the other suit.

After careful consideration of the authorities I am of the opinion that the nature of this suit is such that this court must be held to have had exclusive jurisdiction of the subject matter of the controversy even although the property involved had not been taken into its actual custody. In *Powers* vs. *Building & Loan Assoc.* (C. C.), *supra,* Judge Lurton (now Mr. Justice Lurton), said (86 Fed. at page 707):

'The principle that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be interfered with by process out of another court, is well settled. *Buck* vs. *Colbath,* 3 Wall. 334 (18

L. Ed. 257); *Krippendorf* vs. *Hyde,* 110 U. S. 276, 4 Sup. Ct. 27 (28 L. Ed. 145); *Byers* vs. *McAuley,* 149 U. S. 608, 13 Sup. Ct. 906 (37 L. Ed. 867); *Compton* vs. *Railroad Co.,* 31 U. S. App. 486, 523, 530, 15 C. C. A. 397, 68 Fed. 263. There are two classes of cases in which the court first obtaining jurisdiction should be suffered to proceed without any interference by process from another concurrent jurisdiction. The first class consists of those cases in which the exercise of jurisdiction by one court will interfere with the prior possession of the *res* by another court of competent and concurrent jurisdiction. *Krippendorf* vs. *Hyde,* 110 U. S. 276, 4 Sup. Ct. 27 (28 L. Ed. 145); *Heidritter* vs. *Oilcloth Co.,* 112 U. S. 294, 5 Sup. Ct. 135 (28 L. Ed. 729); *Byers* vs. *McAuley,* 149 U. S. 608, 13 Sup. Ct. 906 (37 L. Ed. 807). The second class is where there are two suits pending in different courts of concurrent jurisdiction, in which the parties are the same, and which involve and affect the same subject-matter, and where the jurisdiction of neither is complete nor effectual unless it may, if necessary or proper, exercise exclusive dominion over the *res* in litigation. The cases relied upon by counsel for defendants of *Gates* vs. *Bucki,* 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961; *Merritt* vs. *Barge Co.,* 24 C. C. A. 530, 79 Fed. 228; *Zimmerman* vs. *So Relle,* 25 C. C. A. 518, 80 Fed. 417; and *Sharon* vs. *Terry* (C. C.), 36 Fed. 337—are cases belonging to the latter class.

The conflict exists in such instances because the suits are in the nature of suits *in rem.*'

In *Illinois Steel Co.* vs. *Putman* (5th Cir.), 68 Fed. 515, 517, 15 C. C. A. 556, 558, the court said in language which is cited with approval in 3 Street, Fed. Eq. Pract., Sec. 2534, p. 1470:

'Where a bill in equity brings under the direct control of the court all the property and estate of the defendants, or of certain named defendants, or certain designated property of all or either of the defendants, to be administered for the benefit of all entitled to share in the fruits of the litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings, such property may properly be held to be in *gremio legis.* The actual seizure of the property is not necessary to produce this effect, where the possession of the property is necessary to the granting of the relief sought. In such cases the commencement of the suit is sufficient to give the court, whose jurisdiction is invoked, the exclusive right to control the property. *Adams* vs. *Trust Co.*, 66 Fed. 617 (15 C. C. A. 1).'

In *Merritt* vs. *Steel-Barge Co.* (8th Cir.), 79 Fed. 228, 231, 24 C. C. A. 530, 533, the court said:

'The doctrine is well settled that when a court,

in the progress of a suit properly pending before it, takes possession of the property, either under a writ of replevin or attachment or by other mesne or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired. While property is so held it cannot be sold under the judgment, sentence, or decree of any other tribunal. Moreover, so long as the property remains in *custodia legis,* no other court, unless by special leave of the court which first acquired jurisdiction, can lawfully proceed with the trial and determination of a suit the object of which is to establish a lien against the property, or to subject the specific property to the payment of debts, or which may result in creating conflicting rights or titles thereto. The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. *Freeman* vs. *Howe,* 24 How. 450 (16 L. Ed. 749); *Peck* vs. *Jenness,* 7 How. 612, 624, 625 (12 L. Ed. 841); *Taylor* vs. *Carryl,* 20 How. 583, 597 (15 L. Ed. 1028); *Wiswall* vs. *Sampson,* 14 How.

52 (14 L. Ed. 322); *Covell* vs. *Heyman,* 111 U. S. 176, 4 Sup. Ct. 355 (28 L. Ed. 390); *Heidritter* vs. *Oilcloth Co.,* 112 U. S. 294, 5 Sup. Ct. 135 (28 L. Ed. 729); *Riggs* vs. *Johnson Co.,* 6 Wall. 66, 196 (18 L. Ed. 768); *Central Trust Co. of New York* vs. *South Atlantic & O. R. Co.* (C. C.), 57 Fed. 3. The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of litigation, the court may be compelled to assume possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to federal and state courts, being the outgrowth of necessity, is 'a principle of right and of law,' which leaves nothing to the discretion of the court, and may not be varied to suit the convenience of litigants. *Gates* vs. *Bucki,* 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961; *Chittenden* vs. *Brewster,* 9 Wall. 191 (17 L. Ed. 839); *Orton* vs. *Smith,* 18 How. 263, 265 (15 L. Ed. 393); *Union Trust Co.* vs. *Rockford, R.*

I. & St. L. R. Co., 6 Biss. 197, 24 Fed. Cas. 704; *Owens* vs. *Railroad Co.* (C. C.), 20 Fed. 10; *Union Mut. Life Ins. Co.* vs. *University of Chicago* (C. C.), 443.'

And see *Adams* vs. *Mercantile Trust Co.* (5th Cir.), 6 Fed. 617, 620, 15 C. C. A. 1.

And in *Farmers' Loan Co.* vs. *Railroad Co.*, 177 U. D. 51, 61, 20 Sup Ct. 564, 568 (44 L. Ed. 667), in which it was held that as between the same parties in a proceeding *in rem,* exclusive jurisdiction must be regarded as attaching when the bill was filed and process had been issued, the court said:

'The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the

court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to Federal and State courts. *Peck* vs. *Jenness,* 7 How. 612 (12 L. Ed. 841); *Freeman* vs. *Howe,* 24 How. 450 (16 L. Ed. 749); *Moran* vs. *Sturgess,* 154 U. S. 526 (Sup. Ct. 1019, 38 L. Ed. 981); *Central Bank* vs. *Stevens,* 169 U. S. 432 (18 Sup. Ct. 403, 42 L. Ed. 807); *Harkrader* vs. *Wadley,* 172 U. S. 148 (19 Sup. Ct. 119, 43 L. Ed. 399).'

Applying the rule laid down in the foregoing authorities I am of opinion that this suit, being brought to declare and enforce a trust in real property and being one in which the trustees holding title to the property were brought before the court by service of process, and in which in the progress of the litigation the court might be compelled to assume possession and control of the property to be affected, must be deemed a suit in the nature of a suit *in rem* in such sense that upon the filing of the bill and the issuance and service of the process the exclusive jurisdiction of this court attached, and that it must be held to have retained such exclusive jurisdiction to determine the subject matter of the controversy until the termination of this litigation."

It is equally well settled, that equity will enjoin another action, when the remedy is more complete in the pending action.

Joyce on Injunctions, Sec. 576.

XVI.

The argument of the respondent fails, because the proposed injunction is not directed toward restraining the plaintiff from bringing some other action, but toward restraining it from further prosecuting the action already brought.

1. The argument of plaintiff is based upon the proposition that one part of Contract B gives it this right of action, entirely irrespective of any earnings of the Western Pacific. But the dependent bill is framed on no such theory. The allegations in that bill of complaint (Section 7 thereof), are as follows:

> The Old Denver Company and the Rio Grande Western Company, jointly and severally, covenanted and agreed with the Western Pacific Company and with the Trustee under the Western Pacific Company's First Mortgage as aforesaid, to pay semi-annually to the Trustee of said mortgage, beginning February 26, 1909, and continuing until all of the bonds secured by the Western Pacific Company's First Mortgage should be fully paid, principal and interest, such sum of money as should be necessary *in addition to the earnings of the Western Pacific Company* and other moneys actually and lawfully appropriated by it for the purpose, to meet the interest and sinking fund payments upon the issue of bonds secured by the said First Mortgage, and provided for therein, promptly and at the time and place stipulated in the said

mortgage, and to pay any taxes which the Western Pacific Company might be required or permitted to pay thereon or to deduct therefrom,

And again (Section 13 thereof):

That by and according to the terms of the said Contract B, the companies there promising now the defendant the New Denver Company, became bound to pay unto the Trustee under the Western Pacific Company's First Mortgage, from and after September 1, 1908, or the earlier acquisition or completion of the Western Pacific Company's main line of railroad from San Francisco to Salt Lake City, in such amount as would, together with the amount actually and lawfully appropriated by the Western Pacific Company out of its earnings and other income, and by it paid over to its fiscal agent in the City of New York or its fiscal agent in the city of San Francisco, or both of them, for the purpose of paying the interest to fall due during the then current calendar half year upon the Western Pacific Company's First Mortgage bonds upon which interest should be payable, be sufficient to pay all such semi-annual instalment of such interest; and such further amount as would, together with the amount actually and lawfully appropriated by the Western Pacific Company out of its earnings and other income, and by it paid over to the mortgage trustee for the purpose of meeting the sinking fund payment, if any, required by said mortgage to be

made by the Western Pacific Company during the then current calendar half year, be sufficient to meet such sinking fund payment.

And again (Section 17 thereof):

That by reason of the uncertainty as hereinbefore set forth as to the amount of earnings of the Western Pacific Company from time to time heretobefore or hereafter applicable to said sinking fund payments or hereafter to said interest instalments, your orator is not informed as to the exact amount for which the defendant the New Denver Company is liable under the terms of said Contract B, in respect either of payments due from time to time to the said sinking fund or for said instalments of interest or by reason of the breach of said contract as a whole; that the true amount thus due and the true amount of such liability can appear only upon an accounting to be had under the direction of this Honorable Court ascertaining the amount of such earnings so applicable and the amount of deficiency therein for which the defendant the New Denver Company is liable as aforesaid; and that also, in view and because of the various defaults of the New Denver Company, hereinbefore set forth, that Company is liable to your orator for a total or gross sum in liquidation of its total future liability under said Contract B and also under the said guaranties but that such total or gross sum can only be ascertained and fixed by an accounting and

> adjudication by this Honorable Court proceeding in due course upon equitable principles. That your orator is informed and believes that adverse claims in respect of the amount earned and the amount due are made by the defendant the Western Pacific Company and the defendant the New Denver Company, which can be resolved and determined only on such an accounting as aforesaid, to which both of the said companies shall be parties, and that the defendant the New Denver Company is liable herein for the amount of the deficiency appearing upon such an accounting in respect of the said sinking fund payments, of the said interest payments, and the amount fixed in respect to the future liability of said defendant. .

It is thus clear that the bill is framed upon the theory that the liability of the Denver and Rio Grande is dependent entirely upon the earnings of the Western Pacific—in other words, upon the theory that the liability of that company is represented by the difference between what the Western Pacific may earn, and the amount of the interest and sinking fund. If the plaintiff had adopted the theory of counsel on their oral argument of the brief, namely: that the Denver and Rio Grande is liable for any amount not *actually paid* by the Western Pacific, and had brought action at law for the amount, the problem might have been different.

2. The dependent bill alleges that among the properties "expressly assigned and transferred by

the First Mortgage from the Western Pacific Company to the trustee under said mortgage," was Contract B. It further alleges that it has filed its bill in this Court to foreclose that mortgage. In other words, the very dependent bill itself alleges that Contract B is a part of the mortgage, and that in the suit in the California Court "your orator, as trustee as aforesaid, prayed, among other things, that said First Mortgage be foreclosed, that an account be taken, and had of the property subject to the lien of said First Mortgage, and the same decreed to be a valid and existing lien upon all railroads and property, real and personal, rights, privileges and franchises covered by and embraced in said First Mortgage, together with all additional property subject thereto. That the amount due and unpaid upon said First Mortgage Bonds for principal and interest be ascertained and determined." The situation, then, is this: the plaintiff has filed its bill in the California Court, setting up the mortgage (of which Contract B is as much a part as the Oakland terminals), and asking that this Court determine what property is subject to the lien of that mortgage, how much is due, and that the mortgage be foreclosed; then, it files this dependent bill in New York, alleging the pendency of the California suit, and asking for the enforcement of Contract B, as part of the mortgaged property.

3. The dependent bill alleges (paragraph 13) that since March 1, 1908, the Western Pacific has diverted income and earnings which should have

been applied on interest and sinking fund, and asks for an accounting of these sums. But it is clear that these sums must have been diverted to Capital account, and have become a part of the corpus of the actual property now in the hands of the receivers. If, then, it should be adjudged by the New York Court that there has been such a diversion, in violation of the terms of Contract B, then the Denver and Rio Grande may be entitled to reimbursement out of the property; at any rate, the questions as to how far there has been such a diversion, whether or not such a diversion is in violation of Contract B, and how far the Denver and Rio Grande is entitled to a credit therefor, are questions involving the title and possession of part of the property now in the hands of this Court.

4. The dependent bill alleges that the covenants of Contract B run with the railroads of the parties to that contract. In so far, at least, as they may run with the railroad of the Western Pacific, any judgment in that case may result in creating a lien upon property in possession of the receivers.

5. The dependent bill makes the Western Pacific a party, and asks for an accounting from it.

XVII.

The dependent suit in New York makes the Western Pacific a party, and asks for an accounting from it. Inasmuch as no judgment can be rendered against the Denver without an accounting from the Western Pacific, the latter is a necessary party.

It is alleged in the dependent bill that the trusts

raised by Contract "B" cannot be executed otherwise than by an "accounting and decree of this Honorable Court, as in the prayer of this bill set forth."

(*Dependent Bill,* Section 20.)

The prayer asks:

> "That an account may be taken and had of the amount of the gross earnings and income of the Western Pacific Company during each fiscal half year, from the creation of the said First Mortgage until the time of said accounting, and of the amount of the expenses and charges incurred by and accruing against the Western Pacific Company during the said periods (including interest and the sinking fund payments falling due during said half years respectively), classified in accordance with the provisions of the said Contract B; the amounts, if any, paid by the Western Pacific Company to its fiscal agents or any of them on account of the interest to fall due, secured or evidenced by the said First Mortgage Bonds; the amount, if any, paid by the Western Pacific Company to the said Mortgage Trustee to meet the sinking fund payments required by the said First Mortgage; the amount due under the said Contract B, and under the said guaranties from the defendant the New Denver Company for interest and for payments upon the sinking fund required to be paid by it under the provisions of the said Contract B, and the said Guaranty;

the amount or sum which will remain payable upon the said Bonds and Guaranty for principal and for interest after the sale of the said Western Pacific Company's property embraced within the said suit for foreclosure, and the application of the net proceeds of said sale to the principal amount evidenced and secured to be paid by the said Bonds and Guaranty, and, in that connection, the principal sum required to be paid or to be secured to be paid by the New Denver Company in order adequately to provide for the fulfillment of its covenants for future payment and guaranty contained in the said Contract B and said guaranties."

There is also a prayer for general relief.

Now, the Western Pacific is not only made a party to this action but it is an absolutely necessary party, without whose presence no decree can be rendered.

Saloy vs. *Bloch,* 136 U. S. 338.

The dependent bill also alleges that no payments whatever have been made into the sinking fund, and that the Western Pacific has at various times since March 1, 1908, made and received earnings which should have been applied to that account.

(Dependent Bill, Section 13.)

A case is made out, therefore, not only for an accounting, but also for (1) a judgment against the Western Pacific for the amount which has been diverted from earnings to other purposes than those specified in Contract "B"; (2) a decree of segrega-

tion and sale of the Western Pacific's property to satisfy that judgment; and, (3) a decree for the application of funds in the hands of the receivers to a reduction, *pro tanto,* of any judgment against the Denver.

It is, of course, elementary, that under the prayer for general relief, a Court of Equity will render any decree consistent with the allegations of the bill.

Foster's Federal Practice, Vol. I, Section 83.

It is equally elementary that a Court of Equity will enforce the collection of the amount found due on an accounting by segregation and sale.

Moore vs. *Calkins,* 85 Cal. 177.

Likewise, under the pleadings, the Court in New York *must* render a judgment for an accounting from the Western Pacific. But the very order appointing the receivers puts in their hands all the accounts, books and records of the Company. A decree for an accounting, therefore, must of necessity operate against these records; moreover, it must operate *in personam* against the receivers themselves, for the reason that the person in possession of the accounts is *ex necessitate* compellable by process to produce them.

Moreover, there is no doubt of the principle that when Equity takes jurisdiction for an accounting, it will retain the whole case, and settle the whole controversy, even to the extent of adjudicating matters of purely equitable cognizance.

Patterson vs. *Glassmire,* 166 Pa. St. 230;
Rathbone vs. *Warren,* 10 Johns. (N. Y.) 587.

Accordingly, the accounting would undoubtedly show:

(a) That a considerable amount of money has been diverted from current earnings to Capital account;

(b) That the receivers will have on hand considerable money derived from current earnings.

(a) Now this money, which has been diverted to Capital account is in possession of the receivers, in that it has been expended for betterments, for improvement of the road and equipment such as the Arnold Loop and the oil cars. Some of that money, notably $130,000, is actually in the hands of the receivers in cash. Now, under the principles mentioned above, the New York Court in the dependent bill would have plenary power to determine whether or not this money should be applied to the sinking fund, and to direct its application accordingly. In this connection, it will be noted that the prayer of the dependent bill specifically asks that the "Court find and declare the true meaning, construction and effect of said Contract B in respect of sinking fund payments thereby required to be made."

Furthermore, this matter involves another consideration peculiarly within the cognizance of the Court of primary jurisdiction, and that is the question of the application of these diverted funds to the satisfaction of preferential claims.

Southern Ry. Co. vs. *Carnegie Steel Co.,* 176 U. S. 257.

(b) The Receivers have cash on hand, not only from earnings since the receivership, but also from money earned prior to their appointment, and collected since. As to money earned prior to their appointment, the question is before this Court as to whether that is to be applied to preferential claims. Moreover, the receivers are obliged, from time to time, and under orders of this Court, to expend money for necessary betterments. But in the event that the New York Court should decide that these funds should be applied strictly to purposes provided by Contract "B," a conflict would arise which could only result in hopeless confusion.

XVIII.

The Denver and Rio Grande Railroad Company is an indispensable party to this action to foreclose.

> "It is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject matter of the suit, are to be made parties to it either as plaintiffs or as defendants, so that there may be a complete decree which shall bind them all."

The above language is quoted from Story's Equity Pleading, Section 72, by the Supreme Court in *Gregory* vs. *Stetson,* 133 U. S., 588.

Mr. Beach, in his work on modern equity practice, Vol. 1, Sec. 55, quotes the following language from *Chadbourne's Executors* vs. *Coe,* 10 U. S. App. 83:

"'The Supreme Court of the United States divide parties to suits in equity into three classes; first, formal parties; second, necessary parties; third, indispensable parties. Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation. They may be parties or not at the option of the complainant. Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties if practicable in obedience to the general rule which requires all persons to be made parties who are interested in the controversy in order that there may be an end of litigation; but the rule in the federal courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, to be determined in any competent forum. * * * Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either

affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good coonscience."

In this Circuit, the Court of Appeals in *Consolidated etc. Co.* vs. *San Diego,* 93 Fed. 851, quotes the above language from *Gregory* vs. *Stetson,* and says:

"From this brief reference to the allegations of the bill, it will readily be seen that the San Diego Water Company has an interest in the subject-matter of the suit, and that any decree that might finally be rendered therein would affect its interest. It is certainly interested in obtaining the relief sought for by the complainant, and would doubtless be entitled, in its own behalf, if so disposed, to bring a suit in its own name, and litigate the same question, in a competent court. Its presence is necessary to a full and complete determination of the questions in controversy in this suit. To determine some of the questions raised by the bill as to the reasonableness of the rates fixed by the ordinance, it will involve an investigation of the management of the affairs of the company. In *Shields* vs. *Barrow,* 17 How. 130, 139, indispensable parties are described as 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final

termination may be wholly inconsistent with equity and good conscience.' See also, *Barney* vs. *Baltimore City,* 6 Wall. 281, 284; *Cunningham* vs. *Railroad Co.,* 109 U. S. 446, 456, 3 Sup. Ct. 292, 609; *Cattle Co.* vs. *Frank,* 148 U. S. 603, 13 Sup. Ct. 691."

It would seem clear that no decree can be entered in this case which will not affect the Denver and Rio Grande: (1), because it is elementary that the decree *nisi* must direct the terms upon which the property of the Western Pacific shall be sold—that is, either burdened by, or free from the covenants of Contract "B"; (2) because the final decree must direct how the proceeds of the sale are to be distributed. This involves a construction of that portion of the First Mortgage to the effect that money derived from a sale shall be applied "without preference or priority of principal over interest or of interest over principal."

First Mortgage, Article V, Sec. 10.

Section 10: The purchase money, proceeds or avails of any sale of the mortgaged and pledged premises and property, together with any other moneys which may then be held by the Trustee or be payable to it under any of the provisions of this indenture as part of the trust estate, shall be applied as follows:

First: To the payment of the costs, expenses, fees and other charges of said sale, and a reasonable compensation to the Trustee, its agents

and attorneys, and to the payment of all expenses, liabilities and advances incurred or disbursements made by the Trustee, and to the payment of all taxes, assessments or liens prior to the lien of these presents, except any taxes, assessments or other superior liens subject to which such sale shall have been made.

Second: To the payment of the whole amount due, owing or unpaid upon the bonds hereby secured for principal and interest, with interest on the overdue installments of interest at the rate of five per cent. per annum, and, in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest without preference or priority of principal over interest or of interest over principal or of any installment of interest over any other installment of interest, ratably, according to the aggregate of such principal and to the accrued and unpaid interest.

Third: Any surplus then remaining to the Railway Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

The Denver, of course, is vitally interested in this distribution of the funds, because its liability, *pro tanto* depends upon it; (3) because the decree *nisi* must fix the upset price, and upon that price is very apt to depend the amount of the deficiency

judgment, and therefore the amount of the Denver's future liability.

But the property of the Western Pacific is tied up to the Denver and Rio Grande in other matters which are vital to both roads:

1. Is the Western Pacific to be sold, subject to those provisions of Contract "B" which make it, so far as traffic is concerned, a mere extension of the Denver and Rio Grande? When the receivers, or the referee, or the special master offer it for sale from the auction block, that is the first thing a prospective bidder will inquire about. On the one hand, it is likely that the Union Pacific, or the Chicago & Northwestern, or the Burlington, might hesitate to bid for a property which was bound to deliver all its traffic to the Denver. On the other hand, an independent bidder might hesitate to buy a road which ends at Salt Lake, and with no traffic arrangements to the East. So that the decree *nisi* in directing a sale, must direct whether or not the property is to be sold, subject to Contract "B," or freed from it—and the Denver is a necessary party to the determination of that question.

2. In the same manner, the Western Pacific, by Contract "C," is tied up to the Missouri Pacific, through the Denver and Rio Grande. The parties to Contract "C" are the Missouri Pacific and the Denver and Rio Grande. It provides that the two parties shall deliver, each to the other, all traffic originating on the roads; and in addition, the Den-

ver agrees to deliver to the Missouri Pacific, all traffic originating on the Western Pacific.

This contract further provides:

> And whereas, the railway line of said Pacific Company hereinbefore mentioned will, when completed from San Francisco to Salt Lake City, furnish a new outlet to the Pacific Coast for west-bound traffic carried by the parties to this agreement, and said Pacific Company will then be in a position to make substantial contributions of east-bound traffic for the said joint through line hereinabove provided for; and,
>
> Whereas, the Pacific Company has entered into a traffic agreement with the Denver Company and the Western Company for the establishment and maintenance of a joint through line over their several connecting railways between San Francisco on the west and Pueblo on the east, but upon the express understanding that the Missouri Company and the Denver Company shall simultaneously enter into this agreement; and,
>
> Whereas, the Pacific Company, for the purpose of raising capital wherewith to complete and equip its said railway, has authorized an issue of Fifty Million Dollars of its First Mortgage Five Per Cent. Thirty-Year Gold Bonds, and has secured the same by Mortgage to Bowling Green Trust Company, Trustee, the same bearing date Sept. 1st, 1903; and,

Whereas, the establishment and the continued and effective maintenance of the traffic relations established by this agreement between the Missouri Company and the Denver Company, parties hereto, are of substantial benefit and advantage to the Pacific Company by reason of the railway connection as aforesaid at Salt Lake City and by reason of the traffic agreement aforesaid between the Denver Company and the Western Company on the one hand, and the Pacific Company on the other; and,

Whereas, the establishment and the continued and effective maintenance of the traffic relations established by said hereinbefore recited agreement between the Denver Company and the Western Company on the one hand and the Pacific Company on the other hand, are of substantial benefit and advantage to the Missouri Company by reason of the furnishing of additional business for the joint line of the Denver Company and the Missouri Company created by this agreement;

Now therefore, in further consideration of the premises and of the mutual covenants and agreements herein set forth, it is hereby further covenanted and agreed by and between the parties to this agreement, to wit, the Missouri Company and the Denver Company, as follows:

1. This contract is made not only for the mutual benefit of the parties hereto, but also for

the benefit of Western Pacific Railway Company, being the Pacific Company aforesaid.

2. The Pacific Company having a beneficial interest in this contract and in the continuance of operations thereunder, said Company, and its successors and assigns, shall have the right to enforce specific performance of this agreement and of each and every part thereof (whatsoever the nature of any provision thereof may be), for and during the entire term hereinafter provided.

3. The said traffic contract between the Denver Company and the Western Company of the one part, and the Pacific Company of the other part, and the continuance of operations thereunder being of substantial benefit and advantage to the Missouri Company, said Missouri Company and its successors and assigns shall have the right to enforce specific performance of said agreement and of each and every part thereof for and during the entire term thereof; but nothing in this section contained shall be taken to authorize any action that shall have the effect of impairing in any manner or to any extent the lien or security of said First Mortgage of the Pacific Company or of preventing, obstructing or interfering with the exercise of any of the remedies thereby granted to the Trustee, or to prevent the modification or termination of said traffic contract in the manner therein provided therefor or to impair or

qualify the right of the Denver Company to enter into any agreement, in its own absolute discretion, abrogating, or modifying any provision or provisions thereof in accordance with the provisions in that behalf therein contained.

4. All of the rights of the Pacific Company under this agreement may by said Pacific Company, be effectively pledged by assignment thereof to Bowling Green Trust Company, Trustee, under the first mortgage of the Pacific Company.

5. The Trustee for the time being under the said first mortgage of the Pacific Company, at all times, both prior to and after default under said mortgage, shall have the right to enforce specific performance of this agreement, and each and every part thereof, by each and both of the parties thereto, and to enforce this agreement by suits in equity or actions at law or otherwise as it may deem appropriate from time to time.

6. This contract shall be and continue in full force and effect from the date of executing the same and until all of the Fifty Million Dollars of First Mortgage Five Per Cent. Thirty-Year Gold Bonds of the Pacific Company, principal and interest, shall be fully paid, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the First Mortgage of said Pacific Company, and this said

contract shall run with the railways of each and both of the parties hereto and shall accrue to the benefit of and be binding upon them and their respective successors and assigns."

It will be remembered, that this contract was one of those referred to in the preliminary agreement between the Denver and the Western Pacific, and was specifically pledged under the First Mortgage. So that, if and when the road is sold, the interlocutory decree must determine whether it is to be delivered free from Contract "C," or bound by it. And in the determination of *that* question, both the Denver and the Missouri Pacific are necessary parties.

3. By the provisions of Contract "A," the Denver agrees by the purchase of second mortgage bonds, to furnish the money necessary to complete and equip the Western Pacific. So far as the completion of the road is concerned, this contract was carried out. But it was certainly never carried out as to equipment. The schedule attached to, and made a part of Contract "A," reads:

Equipment:

"This will consist of locomotives of different classes, modern design and best construction. Also cars of various classes and modern design for passenger train service, and cars of various classes and suitable design for freight service, the aggregate cost of the Equipment being not less than $3,000,000."

But the Western Pacific owns no passenger cars at all, and practically no freight equipment. It is supplied with both passenger and freight cars by the Denver, under leases, by which the Western Pacific pays large rentals. Now, Contract "A" is also pledged under the First Mortgage; it is an asset in the hands of the receivers; and there is a grave question, as to whether or not the Denver is not compellable to provide both passenger and freight cars; or at least, an involved accounting is necessary of the proceeds of the Second Mortgage bonds—and again the Denver is a necessary party.

(See Report of Receivers' Ex. "H," "I" and "J.")

4. The freight terminals used by the Western Pacific in Salt Lake, are the property of the Denver and Rio Grande. These terminals are held under a lease, which is to run as long as the First Mortgage bonds are unpaid. This lease is also pledged to the Trustee under the First Mortgage. Again, if the property is to be sold, it is necessary to determine whether it is to be sold subject to this lease, and the Denver is a necessary party to the determination of that question.

(See Receivers' Report, Exhibit "G.")

5. The passenger terminals in Salt Lake City belong to a separate corporation, the Salt Lake City Union Depot and Railroad Company. They consist of an imposing and convenient union depot, and extensive and commodious yards. The stock of this corporation is owned by the Western Pacific and the

Denver, the latter owning one share more than the former. This Depot Company has an outstanding bond issue, of which the Bankers' Trust Co. is trustee. There is a contract between the Denver and the Western Pacific, by which each pays one-half the interest on the bonds, as well as other expenses. This agreement is pledged under the Deed of Trust of the Depot Company, and the Denver and the Western Pacific; each guarantee one-half of the interest on its bonds.

(See Receivers' Report, Exhibits "K" to "P.")

So that, under these arrangements, it must be determined: (a), whether or not the property of the Western Pacific is to be sold subject to this lease; (b), how far the Western Pacific's guaranty of the bonds or the Depot Company is a lien on its property; (c), the rank of that lien, if it exists, *and the highly important and interesting questions as to whether or not this guaranty of one-half of the interest on the Depot Company's bonds takes precedence over the lien of the Western Pacific's First Mortgage; and whether or not the Denver is not bound by Contract "B" to pay this, as a necessary operating expense.*

In any event, it makes the Denver, again, a necessary party.

6. In February, 1910, another contract was entered into between the Denver and the Western Pacific. It reiterates Contracts "A" and "B," and agrees to continue to supply sufficient money to fully carry out the provisions of those documents. This

latter contract, however, recognizes that inasmuch as the capital stock of the Western Pacific is only $75,000,000.00, that it cannot lawfully create any indebtedness above that amount. However, it was already indebted $50,000,000.00 on the First Mortgage Bonds, and $25,000,000.00 on the Second Mortgage. Accordingly, by this contract, it was agreed that moneys advanced by the Denver should not constitute a "present indebtedness," but should only become a debt when the capital stock should be increased.

(See Receivers' Report, Exhibit "Q.")

Now, the effect of this agreement upon the Western Pacific, is also of great importance from two points of view:

1. It reiterates the covenant to make up all sums necessary under both Contracts "A" and "B";

2. It postpones any claim for sums so advanced, until the Western Pacific can lawfully create the indebtedness.

Under Contract "A," the Denver agreed to purchase the entire issue of $25,000,000.00 Second Mortgage bonds at 75, in order to provide money for the completion and equipment of the road. In order to consummate this transaction (as well as to raise other moneys), the Denver created its First and Refunding Mortgage, as security for an authorized issue of $150,000,000.00 Five per cent. bonds. Then in August of the same year (1908), the Denver and the Western Pacific made an agreement with the

Bowling Green Trust Company by which $10,863,000 of the Western Pacific's Second Mortgage Bonds were pledged as security for the Denver's First and Refunding Bonds; this transaction, as this latter agreement shows, was in furtherance of a contract between the Denver and three New York banking firms, Blair & Co., Solomon & Co., and Read & Co., by which the bankers purchased the Denver's convertible notes in the sum of $10,000,000 and took as security $15,000,000.00 of the Denver's First and Refunding Bonds. The money realized from these notes was largely used by the Denver in the purchase of Western Pacific Second Mortgage Bonds. Sec. 7 of this contract specifically recognizes the existence of Contract "B".

(See Report of Receivers, Exhibit "R.")

In July, 1909, the Denver and the Western Pacific entered into a further contract with the Equitable Trust Company. This contract recites that *by its very terms* the Denver's First and Refunding Mortgage provides that $23,000,000.00 of the bonds secured by it may be used to purchase Western Pacific Bonds in accordance with Contract "A". This agreement provides that $6,100,000.00 further Western Pacific Second Bonds shall be deposited with the trustee of the Denver's First and Refunding Mortgage.

(See Report of Receivers, Exhibit "S.")

Then, in May, 1912, the Denver created its Adjustment Mortgage, as security for an authorized issue of $25,000,000 seven per cent bonds. This

mortgage, by its terms, recognizes the liability of the Denver under Contract "B".

It would seem then, that purchasers of the Denver's First and Refunding Fives and its Adjustment Sevens, had ample notice of its obligations to the Western Pacific; to the determination of that vital question, affecting the ranks of the lien of Contract "B", the Denver is also a necessary party.

In this connection with the general proposition, the language of the Supreme Court in *Caldwell* vs. *Taggart,* 4 Pet. 190, is most pertinent:

> "In reply to all these grounds of reversal, for want of parties, or for want of due maturation for a final hearing, it has been urged that nothing is ordered to be mortgaged or sold beside Caldwell's own interest, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ those means in the exercise of its jurisdiction.
>
> There is no want of learning in the books on the subject. The general rule is laid down thus:

'However numerous the persons interested in the subject of a suit, they must all be made parties plaintiff or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly safe to those who have to obey it, and to prevent further litigation'. And again, 'all persons are to be made parties who are legally or beneficially interested in the subject matter and result of the suit', extending in most cases to heirs-at-law, trustees and executors.

Thus, in a case in which a remainderman in tail brought a bill against the tenant for life to have the title deeds brought into court, and there were annuitants on the reversion, and a child interested under a trust term of years prior to the limitation to the plaintiff—that is, incumbrances prior and posterior to the plaintiff,—Lord Hardwicke (3 Atk. 570), refused a decree without first making them parties. So, where husband tenant for life, remainder to his wife for life, remainder over, brought his bill without joining the wife, the objection was made and sustained on the ground that if there was a decree against the husband, it would not bind the wife. (1 Atk. 289.)

So, if an under mortgagee brings his bill to

foreclose the original mortgagor, he must make the first mortgagee a party. (3 P. W. 643.) This is the relation in which the complainants here seek to place themselves in reference to Mr. Singleton.

And there are various cases in which, though the heir-at-law is not a necessary party, he is made such in practice, and the reason assigned is to free the estate from every blame that may lessen its value at the sale. (2 Ves. 431; 3 P. W. 91; 3 Br. Ch. Rep. 229, 365.)

And so in cases of indefinite or blended interests, all the participators are necessary parties; as where a residue is devised to several, or even devised by specified shares.

It is clear, then, that this cause must go back as well to have the necessary parties made as to have the decree reformed and reduced to legal precision."

In *State of California* vs. *Southern Pacific Co.,* 157 U. S. 229, the Supreme Court, in refusing to go on with a case in which the rights of the City of Oakland would have been involved, say:

"It was held in *Mallow* vs. *Hinde,* 25 U. S. 12 Wheat. 193 (6:599) that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the circuit court if its process cannot

reach them or if they are citizens of another state; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the circuit court forms no ground for dispensing with such parties. And the court remarked: 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court'."

The same doctrines are re-declared in *Minnesota* vs. *Northern Securities Co.,* 184 U. S. 199.

XIX.

The Court has full power *sua sponte,* to direct that the Denver and Rio Grande be made a party.

Equity Rule 37 provides: "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause".

And that the Court will, *sua sponte,* always remedy a defect in parties is illustrated by *Minnesota* vs. *Northern Securities Co.,* 184 U. S. 199.

And the Court has full power to order a necessary party to appear and plead, where he is interested

in the subject-matter within the jurisdiction, even though he is a non-resident of the District.

Act of Mar. 3, 1875,—*Compton* vs. *Jessup,* 68 Fed. 263.

In conclusion we respectfully submit:

1. That the rule to show cause be made permanent and that the plaintiff be enjoined and restrained from further prosecuting the dependent action in New York.

2. That following the procedure in the Compton case, this Court should make and enter its order directing that the Denver & Rio Grande be made a party to this action, and be instructed to appear by Cross Bill, or Bill in Intervention, or by such other pleading as it may be advised.

3. That upon the appearance of the Denver & Rio Grande, and prior to any order of sale, this Court should adjudicate all matters bearing upon the relation between the two railroads.

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